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No. 88-

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1988

PATRICK H. DIAMOND,

Petitioner,

v.

DAVID P. REYNOLDS,
REYNOLDS METALS COMPANY,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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September 19, 1988

246 OP

Question Presented For Review

When Sedima* expanded RICO standing to include standing for those RICO victims who were injured by the underlying predicate acts of racketeering, did that expansion of standing to those with "direct injury" eliminate RICO standing for those RICO victims who had previously had standing, i.e., victims who had suffered a "racketeering injury" or "indirect injury", as four Circuits have held, or continue it, as five Circuits have held?

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*Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985).

LIST OF PARTIES

The parties to the proceeding below were the petitioner, Patrick H. Diamond, the respondents, David P. Reynolds and Reynolds Metals Company, and two other parties, Ralph S. Thomas and Robertshaw Controls Company.

Neither Ralph S. Thomas nor Robertshaw Controls Company is a respondent to this Petition.

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OCTOBER TERM, 1988

PATRICK H. DIAMOND,

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DAVID P. REYNOLDS,
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

The petitioner, Patrick H. Diamond, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above entitled proceeding on June 22, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, affirming the judgments of the District Court, and the opinions of the District Court have not been reported but are reprinted in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on June 22, 1988. this petition for a writ of certiorari to review that judgment has been filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statute Involved

18 U.S.C. §1964. Civil Remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States District Court . . .

18 U.S.C. §1962. Prohibited Activities

(b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise . . . .

(c) It shall be unlawful for any person . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

18 U.S.C. §1961. Definitions

(1) "racketeering activity" means . . . (B) any act . . . is indictable under . . . §1341 (relating to mail fraud) . . . .

Statement of the Case

The Third Circuit affirmed the dismissal on the pleadings of Petitioner's RICO claims, holding:

> "[W]e . . . affirm the district court's dismissal of Diamond's RICO claim. None of the allegations in Diamond's complaint are sufficient to grant him standing under the provisions of RICO." Appendix A, p.11

In reviewing the dismissal on the pleadings alone of Diamond's RICO claims, Counts 1, 2 and 3 of the Complaint, this Court must assume that all facts asserted in the Complaint, and all reasonable inferences therefrom, are true.

The Complaint (reprinted in Appendix C) asserts that:

Patrick Diamond was Vice President, Finance and member of the Board of Directors of Robertshaw Controls Company ¶1, a listed public company, ¶5. The Chief Executive of Reynolds Metals, David P. Reynolds, was also a member of the

Board of Robertshaw, and was Robertshaw's Chairman, ¶2. Another director of Reynolds Metals, Ralph S. Thomas, was not only also a member of the Board of Robertshaw, but also he was the Chief Executive of Robertshaw, ¶4.

David Reynolds, and Thomas, in violation of their fiduciary duty to Robertshaw's shareholders, devised a scheme whereby David Reynolds, Reynolds Metals, and Thomas, "the defendants", would acquire and maintain an interest in and control of Robertshaw, ¶10, so that Reynolds Metals could buy Robertshaw stock at the lowest possible price, ¶11b, and eliminate all public shareholders, ¶11, ¶27. As part of their scheme to defraud, the defendants sought to deceive the Robertshaw shareholders through mail fraud, ¶¶11e, 31 f. To achieve their objectives the defendants made numerous

mailings of misleading documents including Robertshaw proxy statements, ¶12Ai, Bi, ¶¶32, 33, 34, 36, 39, 41, 43, 46, 47, Reynolds Metals proxy statements, ¶¶12Biv, 37, Robertshaw press releases, ¶12Aii, Ci, ¶¶48, 49, 51, and Reynolds Metals S.E.C. Form 13-D's, ¶50.

These misleading mailings were acts of mail fraud, in violation of 18 U.S.C. 1341, ¶¶35, 36, 38, 40, 42, 45-51. Acts of mail fraud constitute "racketeering activity" under 18 U.S.C. 1961(1), ¶¶57, 61.

The complaint plainly asserts the causal nexus between Diamond's firing and the violations of §1962 by the defendants; the defendants fired Diamond to further their conspiracy to violate RICO and their violation of RICO:

> "The defendants' plan was as follows:
> f) The defendants would act to prevent and punish any officer or director of Robertshaw who might

interfere with or object to the plan." ¶11f.

"It was further a part of this scheme to defraud that Ralph Thomas fired Patrick H. Diamond in order to facilitate the scheme to defraud", ¶31e

"On November 15, 1983 [Diamond] was wrongfully terminated as an officer and director of Robertshaw Controls Company, effective November 18, 1983." ¶1.

". . . Patrick H. Diamond had been terminated in an attempt to silence any takeover opposition on the Robertshaw Board . . ." ¶36.

"The defendants used the following methods and means to achieve their objectives: ¶12 The defendants caused the firing of Patrick H. Diamond to punish him for his opposition to the plan of the defendants, to eliminate opposition by the officers and directors of Robertshaw to that plan, to intimidate and prevent other Robertshaw officers and directors from opposing the defendants' plan, and Diamond's firing was a result of their violations of Title 18, United States Code, Section 1962." ¶12E. (emphasis supplied)

STATEMENT OF THE CASE

Pat Diamond filed suit on May 15, 1984 in the District Court, which had jurisdiction pursuant to 18 U.S.C. 1964(c), and 28 U.S.C. 1331, and 1332, ¶6. The complaint before the courts below, the Second Amended Complaint, in Appendix C, contained three RICO counts:

Count 1, RICO

". . . [defendants] have acquired and maintained, directly and indirectly, an interest in and control of [ROB] through a pattern of racketeering activity, . . . in violation of 18 U.S.C. §1962(b) . . .", ¶57.

Count 2, RICO

". . . each of the defendants has participated in the conduct of the affairs of [ROB] through a pattern of racketeering activity . . . [in violation of 18 U.S.C. §1962(c)]", ¶60, 61.

Count 3, RICO

"[defendants] conspired to violate 18 U.S.C. §1962(b) and 1962(c), in violation of 18 U.S.C. §1962(d)", ¶65.

Counts 1, 2 and 3

"[Diamond] has been injured . . . by reason of the violation of 18 U.S.C. §1962" b, c and d, ¶58, 62, 66.

STATEMENT OF THE CASE

The District Court dismissed on the pleadings alone the RICO Counts, Counts 1, 2 and 3, in decisions of January 13, 1986 and July 15, 1986. (A review of the record shows that although the July 15th order was in response to a motion for summary judgment, it was based solely on the pleadings. See Opinion of July 15, 1986.) (The opinions are reprinted in Appendix B.) The District Court read Sedima as placing a new limitation, a new standing restriction, on victims:

> "While it appears [Diamond] would have had standing under Callan, he does not have standing under Sedima because he was not injured . . . by the conduct constituting the [RICO] violation." The district Court called Sedima, "intervening case law." Diamond v. Reynolds, et al., (D. Del. July 15, 1986), Appendix B, p.45-47.

STATEMENT OF THE CASE

The Court of Appeals for the Third Circuit affirmed, holding that, as it read Sedima, Diamond had no standing under Sedima because "Diamond's dismissal did not flow from the . . . mailings to ROB shareholders . . .", and the Third Circuit held that:

> "whether Diamond was discharged in retaliation for objecting to the alleged conspiracy or to prevent him from reporting the conspiracy, he does not have RICO standing" because "Diamond's discharge was not sufficiently linked to the predicate acts . . ."

In summary, the Third Circuit said:

> "None of the allegations in Diamond's complaint are sufficient to grant him standing under the provisions of RICO." Appendix A, p. 9, 10, 11.

CONFLICT AMONG CIRCUITS

REASONS FOR GRANTING THE WRIT

Certiorari should be granted:

1. to resolve the conflict among nine circuits as to whether victims with "racketeering injury" also known as "indirect injury" have RICO standing

2. because the decision below holding that Sedima restricted RICO standing, conflicts with this Court's decision in Sedima, and

3. because the fact pattern in this case, an employee fired for opposing RICO violations, is being frequently presented to the federal courts and is resulting in conflicting decisions.

CONFLICT AMONG CIRCUITS

Certiorari Should Be Granted To Resolve The Conflict Among The Circuits As To Whether Sedima Expanded Or Restricted RICO Standing

In Sedima v. Imrex, 473 U.S. 479 (1985), this Court expanded standing to include those RICO victims who had been directly injured by the predicate acts, even though they could show no distinct "racketeering injury". Although this Court did not restrict the existing standing of those with "racketeering injury" or "indirect injury", the Third Circuit and the 5th, 1st and 11th Circuits have read into Sedima a new requirement, that those with racketeering injury or indirect injury must now show that in addition to that injury, they were also injured directly by the predicate acts. These decisions conflict with decisions of the 9th, 8th, 7th, 2nd and 6th Circuits which hold that Sedima

did not so restrict standing, and with the decision of this Court in Sedima.

It is imperative that Certiorari be granted to resolve the conflict among nine circuits over an important matter of statutory interpretation that arises almost daily, and because the Circuits are interpreting Sedima in two distinct and conflicting ways.

Sedima is being interpreted by the lower courts at a staggering rate. In the most recent semiannual Supplement of Shepard's, the citations to Sedima fill over 11 columns, see Appendix D, Shepards, p. 789, 790.

The Second Circuit in Sperber v. Boesky, 849 F.2d 60, 63 (1988) has recently described some of the injuries encompassed within the term "indirect injury":

CONFLICT AMONG CIRCUITS

> "By damages caused only 'indirectly,' we mean 'racketeering' injury, 'competitive' injury or injury caused by the total effect of the pattern of racketeering in the enterprise. See, e.g., Alexander Grant & Co. v. Tiffany Industries, 742 F.2d 408, 411 n.7 (8th Cir. 1984), vacated, 473 U.S. 922 (1985), adhered to in relevant part, 770 F.2d 717 (8th Cir. 1985), cert. denied 474 U.S. 1038 (1986)." Id. at 63.

The circuits are in sharp conflict as to whether Sedima stripped RICO victims with indirect injury or racketeering injury of RICO standing.

This conflict among the circuits on whether there is standing for victims with indirect injury was recently noted by the Fifth Circuit on June 17th:

> "Whether an indirect injury is sufficient to constitute standing in a RICO action is a contested question among the federal courts. Several courts have held that only a direct injury arising from RICO 'predicate acts' constitutes standing." (emphasis supplied)
>
> "Still other circuits have held 'that standing to pursue a RICO action exists even though the plaintiff does not allege that it was a target of

> the racketeering activity and even though the plaintiff only alleges that it suffered indirect injury'. Terre du Lac Ass'n v. Terre du Lac, Inc., 772 F.2d 467, 472 (8th Cir. 1985), cert. denied 475 U.S. 1082 (1986)"
>
> National Enterprises v. Mellon Financial Services, 847 F.2d 251, 253 (5th Cir. 1988).

Similarly, on April 5th, the court in Williams v. Hall, 683 F.Supp. 639, 641 (E.D. Ky. 1988) pointed out this "disagreement among the circuits":

> "Defendants cite several cases in which discharged 'whistleblowers' have been held not to have sustained injury from the predicate acts employed to operate a business by means of a pattern of racketeering activity. [citing Morast v. Lance (11th Cir. 1987) and Nodine v. Textron (1st Cir. 1987)]"
>
> "Plaintiffs cite contrary authority. See Komm v. McFliker, 622 F.Supp. 924 (W.D. Mo. 1987); Callan v. State Chemical Mfg. Co., 584 F.Supp. 619 (E.D. Pa. 1984)"
>
> "This division of authority seems to reflect a disagreement among the circuits as to whether a plaintiff may sue under §1962(a) or (c) on the basis of an indirect injury from the predicate acts. The Sixth Circuit

> seems to be leaning toward the view that indirect injury is sufficient." (emphasis supplied)

The five Circuits granting such RICO standing are the 9th, 8th, 7th, 2nd and 6th Circuits:

Below are summaries of decisions of Courts of Appeal of the five Circuits that allow RICO standing to RICO victims with "racketeering" or "indirect injury:

CONFLICT AMONG CIRCUITS

Ninth Circuit

9th Circuit (1985), citing Sedima, Miller v. Glen & Helen Aircraft, 777 F.2d 496, 498-9, held plaintiff had RICO standing, where defendants' insurance investigator had intimidated a witness, because a portion of the insurance proceeds otherwise available to pay plaintiff went to pay the investigator, thus depleting the amount paid to plaintiff.

CONFLICT AMONG CIRCUITS

Eighth Circuit

8th Circuit (1985), quoting Sedima, Terre Du Lac Assn. v. Terre Du Lac, Inc., 772 F.2d 467, cert. denied 5 U.S. 1082 (1986), held:

> "[RICO] standing exists even though the plaintiff does not allege that it was a target of the racketeering activity and even though the plaintiff only alleges that it suffered indirect injury."

Here the defendants by defrauding land purchasers, indirectly injured the homeowners association by causing its cost of road maintenance to increase.

W.D. Mo., (1987), Komm v. McFliker, 662 F.Supp. 924, 927-928, the court pointed to the conflict among the circuits on this issue and declared that

Eighth Circuit (Continued)

although:

> "in some forums it has been ruled that a whistle blower discharge is only indirectly caused by the pattern of illegal conduct alleged and therefore is not susceptible to RICO relief [citing Morast, 11th Cir. and Nodine, 1st Cir.] . . . the Eighth Circuit seems to be holding firm in allowing RICO recoveries when the illegal conduct has indirectly harmed the plaintiff. [Citing Terre DuLac.] Therefore, although plaintiff does not claim that he was terminated for refusing to act illegally . . . he does now allege a claim for which he could apparently receive relief in this Circuit, under RICO." Komm at 928.

CONFLICT AMONG CIRCUITS

Seventh Circuit

7th Circuit (1984), aff'd same day as Sedima, Haroco v. American National Bank & Trust, 747 F.2d 384, aff'd 473 U.S. 606 (1985), held that:

> "As we said [in Schacht v. Brown, 711 F.2d 1343 (7th Cir. 1983) cert. denied 104 S. Ct. 509 (1983)], 'RICO was designed to protect direct, and not just second-order, victims of organized crime infiltration.' 711 F.2d at 1358. Where racketeers violate section 1962 and indirectly injure investors, we do not doubt that RICO may offer investors a civil remedy. But we rejected in Schacht any effort to limit RICO to such indirect victims". Haroco at 395.

> "the requirement in §1964(c) that a plaintiff be injured 'by reason of' a violation of §1962 . . . simply imposes a proximate cause requirement on plaintiffs. The criminal conduct in violation of §1962 must, directly or indirectly have injured the plaintiff's business or property." (emphasis supplied) Haroco at 398.

The 7th Circuit recently cited with approval these words of Haroco, Flip Side

Productions, Inc. v. Jam Productions, 843 F.2d 1024, 1035 (1988).

N.D. Ill., (1986), Wooten v. Loshbough, 649 F.Supp. 531, 534-536, quotes Sedima. The Court held that a creditor of a corporation had RICO standing to sue the owners of the corporation whose racketeering activity was directed at, and had depleted funds from, the corporation and rendered it unable to pay the creditor.

N.D. Ill., (1986), Pandick, Inc. v. Rooney, 632 F. Supp. 1430, 1433, cites Sedima, and held that:

> "To allow a RICO action only when the plaintiff is the direct victim of the predicate racketeering activities, however, would be to ignore the essence of a RICO violation, which is the commission of racketeering activities in connection with the conduct of an enterprise. Sedima . . ."

CONFLICT AMONG CIRCUITS

> "In Haroco . . . the court stated that 'a business competitor harmed by infiltration. . . might well be able to state a claim under RICO by alleging a "competitive injury"'."
>
> "It is not necessary for [Plaintiff] to allege that it was the target of the predicate fraudulent acts, as long as it was the victim of the dishonest operation of an enterprise. Schacht"

N.D. Ill., (1986), S.J. Advanced Technology & Mfg. Corp. v. Junkunc, 627 F.Supp. 572.

A contractor defrauded the Air Force by mail fraud. Held: an injured competitor has RICO standing under §1964(c) as "a person injured . . . by reason of a violation of §1962 . . . ." even though it was not itself defrauded by the predicate acts of mail fraud.

N.D. Ill., (1985), Northern Trust Bank/ O'Hare, N.A. v. Inryco, Inc., 615 F.Supp. 828, 834 (1985).

A builder paid kickbacks as part of a fraudulent racketeering scheme.

Held: the owner had RICO standing to sue the builder; he was injured "by reason of" the racketeering because the kickback may have depleted the builder's funds making him unable to perform his work adequately. The Court cites Haroco: "The criminal conduct in violation of section 1962 must, directly or indirectly, have injured the plaintiff's business or property," Haroco at 398, (emphasis supplied), and points out "that reading was confirmed by the Supreme Court in Sedima, [p. 497 footnote 15], and in its Haroco affirmance." Northern Trust, at 834.

CONFLICT AMONG CIRCUITS

Second Circuit

2nd Circuit (1988), quoting Sedima, Sperber v. Boesky, 849 F.2d 60, Chief Judge Feinberg assumed plaintiffs with indirect injuries as described in the Sedima opinion, could recover under RICO. He said:

> "[In Sedima] the Supreme Court . . . allowed recovery for injury directly caused by the predicate acts . . . Justices Marshall, Brennan, Blackmun and Powell dissented in Sedima because they would have allowed recovery only for racketeering injury." (emphasis supplied)
>
> "473 U.S. at 519 (Marshall, J. dissenting). The majority evidently agreed that at least some kinds of indirect injury are recoverable since they stated that 'damages include, but are not limited to, the sort of competitive injury for which the dissenters allow recovery'. 473 U.S. 479 n.15." Sperber, at 63. (emphasis supplied)

The Court then pointed out that Justice Marshall, in his Sedima dissent for himself and three other justices, gives examples of hypothetical plaintiffs when he thought Congress intended to allow recovery for their indirect injuries. The court concludes, "We therefore assume, without so holding, that all of Justice Marshall's plaintiffs can recover," Sperber at 64.

E.D.N.Y., (1988), County of Suffolk v. Long Island Lighting Co., 685 F.Supp. 38, 39, citing Sedima: individual ratepayers have RICO standing for frauds perpetrated on the Public Service Commission which induced it to raise rates which injured the ratepayers. The court cited Sedima "that restriction of RICO in civil litigation was a matter for Congress not the courts" and observed that

CONFLICT AMONG CIRCUITS

"Nevertheless, defendants and courts have continued to struggle to restrict civil RICO . . ." Id. at 39.

S.D.N.Y., (1986), Philatelic Foundation v. Kaplan, 85 Civ. 8571, 5/9/86, on LEXIS, reversed on other grounds, 647 F.Supp. 1344 (1986), citing Sedima,

When defendants schemed to defraud stamp collectors, the direct objects of their scheme, they indirectly injured a stamp authenticating company. Court held authenticator had standing for its indirect injuries under of Sedima:

> "While the defendants assert that the indirect injuries alleged by the Foundation are not the type of injury contemplated by §1964(c) there is no indication of such a limitation in the Sedima case. Indeed, the issue confronted in Sedima was not whether indirect injury from the racketeering enterprise was recoverable but whether direct injury from the predicate acts was sufficient to allow recovery. The Court implicitly accepted the premise that the injurious consequences of the enterprise other than the injury directly attributable to the

> fraudulent acts themselves would be recoverable. See Sedima, supra, [p. 497 footnote 15]. Furthermore, since the purpose of RICO is to prevent the infiltration of businesses by those persons conducting racketeering activities, it appears entirely appropriate to permit those legitimate businesses to sue for injuries incurred by reason of the RICO violation even though they were merely the vehicle and not the object of the fraud. See Beth Israel Medical Center v. Smith, 576 F. Supp. 1061, 1070. (S.D. N.Y. 1983)."

S.D. N.Y. (1986), Beck v. Manufacturers Hanover Trust, 645 F.Supp. 675, 680, aff'd 820 F.2d 46, cert. denied, 108 S. Ct. 698 (1988), cites Sedima.

> "Plaintiffs need not allege that they were personally defrauded by defendants; rather they need only allege that they were injured by reason of a scheme to defraud. See, e.g., S.J. Advanced Technology & Mfg. Corp. v. Junkunc, 627 F.Supp. 572, 575-76 (N.D. Ill. 1986); Callan v. State Chemical Mfg. Co., 584 F.Supp. 619, 623 (E.D. Pa. 1984)".

The court relied on Callan, and unlike the Court in Diamond v. Reynolds, did not feel that Sedima was "intervening

case law" that restricted standing that was allowed in cases such as Callan.

S.D.N.Y., 1985, Rodonich v. House Wreckers, 627 F.Supp. 176, 179-180.

Union members, not directly injured by predicate acts had RICO standing for deprivation of rights under the labor laws. (Quoting Sedima)

> "Defendants contend that a racketeering injury is no longer sufficient to confer RICO standing . . . The Supreme Court noted, however, that RICO injuries 'include but are not limited to' the type of competitive injury advocated by the dissenters. Sedima footnote 15. Presumably this would include the 'racketeering injury' concept adopted by the Second Circuit." (emphasis supplied)
>
> "It is not necessary for plaintiffs to allege that the predicate acts are directly responsible for the injury as long as the injury flows from the predicate acts."

S.D.N.Y., 1988, Burdick v. American Exp. Co., 677 F.Supp. 228, a pre Sperber case read Sedima as restricting RICO.

CONFLICT AMONG CIRCUITS

Sixth Circuit

6th Circuit (1987), Grantham and Mann v. American Safety Products, 831 F.2d 596, 606, citing Sedima. Court adopted the Seventh Circuit's Haroco test:

> "the private RICO remedy imposes a causation requirement on plaintiffs: 'the conduct . . . must, directly or indirectly (emphasis supplied) have injured the plaintiff's business or property." Haroco, Inc., 747 F.2d at 398; see also Sedima, [at 496-497] (quoting Haroco favorably)"

E.D.Mo., (1968), Williams v. Hall, 638 F.Supp. 639, 641, cites Sedima. The court reviews the conflict of authority in "whistleblower" cases and states:

> "This division of authority seems to reflect disagreement among the circuits as to whether a plaintiff may sue under §1962(a) or (c) on the basis of an indirect injury from the predicate acts. The Sixth Circuit seems to be leaning toward the view that indirect injury is sufficient. See Grantham." (emphasis supplied)

CONFLICT AMONG CIRCUITS

The four Circuits denying RICO standing to those with "Racketeering injury" are the 5th, 1st, 11th and 3rd Circuits:

Fifth Circuit

5th Circuit, 1988, quoting Sedima, National Enterprises v. Mellon Financial Services, 847 F.2d 251, 254. Court denied RICO standing to a creditor who was unable to collect because bribery depleted debtor's funds and caused its bankruptcy, stating that Sedima precluded such arguments. Id. at 254.

E.D. La., 1987, Cullom v. Hibernia National Bank of New Orleans, 666 F.Supp. 88. In a case similar to Diamond's held no standing for an employee fired for objecting to RICO violations.

CONFLICT AMONG CIRCUITS

First Circuit

1st Circuit (1987), quotes Sedima, Pujol v. Shearson/American Express, Inc., 829 F.2d 1201, 1205. Shearson allegedly defrauded clients by mail and wire fraud. Held: a broker, fired because he took action to report and to stop this illegal scheme, did not have RICO standing because he was not one of the defrauded clients, and he was not injured by the "predicate acts". "In finding that Pujol did not have RICO standing here, we are following our recent decision in Nodine v. Textron, Inc., 819 F.2d 347 (1st Cir. 1987)." Nodine cited Morast at p. 349.

CONFLICT AMONG CIRCUITS

Eleventh Circuit

11th Circuit (1987), quoting Sedima, Morast v. Lance, 807 F.2d 926. Held: A Vice President of a bank, fired by a RICO conspiracy for reporting allegedly improper banking transactions to the Comptroller of the Currency, did not have RICO standing even though "the only way defendants could continue their illegal scheme was to rid the bank of those people who would not 'go along' with the plan." Id. at 932, 933.

CONFLICT AMONG CIRCUITS

Third Circuit

3rd Circuit, quoting Sedima, Diamond v. Reynolds, the instant case: An officer and director of a public company discharged for objecting to a scheme to obtain control of his company and to defraud his shareholders, lacks RICO standing because his firing "did not flow from" "mailings to [his] shareholders", even if he "was discharged in retaliation for objecting to the alleged conspiracy or to prevent him from reporting the conspiracy he does not have RICO standing." 3rd Circuit Opinion, Appendix A.

CONFLICT WITH SEDIMA

Certiorari Should Be Granted Because The Decision of the Third Circuit Conflicts with Sedima

Diamond v. Reynolds, 3rd Circuit

Diamond's Complaint, see Appendix C and Statement of the Case, p.6-p.12, alleged that Diamond, an officer and director of a public company, was fired for opposing a scheme to obtain control of his company and to defraud his shareholders.

The district court reviewed pre-Sedima law and found that Diamond's Complaint would have stated a cause of action, prior to Sedima, but held that Sedima was "intervening case law" and that Sedima had restricted RICO standing: (Appendix B. p. 45-48)

> "The corporate defendant in Callan marketed its products by requiring its sales representatives to bribe those employees of its customers responsible for purchasing its product. Id. at 620. The

> plaintiffs, who were hired by the defendant to sell its products, were fired when they refused to carry out this bribery scheme. Id. The district court concluded plaintiffs had standing to bring a RICO claim, because they had been injured by defendant's alleged racketeering activities. Id. at 622-23."
>
> "Although the factual situation is analogous, Callan is not dispositive because of intervening case law. Sedima, establishes that a party has standing to sue under RICO only 'if injured in [its] business or property by the conduct constituting the violation'." Id. [at 496], while it appears plaintiff would have had standing under Callan, he does not have standing under Sedima because he was not injured . . . by the conduct constituting the [RICO] violation". Diamond v. Reynolds, D. Del, July 15, 1986, in Appendix B at p.7-11. (Emphasis supplied)

The Third Circuit affirmed, stating,

Appendix A, p. 7-11.

> ". . . the district court concluded that Diamond had no standing because he could not establish that his injury (retaliatory discharge) was connected to the predicate acts of mail fraud that constituted the alleged RICO violation. We agree."
>
> "In Sedima, [at 495] . . . the Supreme Court interpreted the

provision as requiring an injury by the specific conduct that constitutes the violation. We recently concluded that 'the injury which confers standing . . . is injury flowing from the commission of the predicate act, not injury flowing from the pattern of such acts'. Town of Kearney . . . (citing Sedima, 473 U.S. at 495). Here, Diamond's dismissal did not flow from the commission of the predicate acts, which involved mailings to ROB shareholders concerning the acquisition of ROB stock"

" . . . Diamond contends that his firing was a consequence of his opposition to appellee's plan to control ROB. Yet, whether Diamond was discharged in retaliation for objecting to the alleged conspiracy or to prevent him from reporting the conspiracy, he does not have RICO standing." (emphasis supplied)

"Diamond was not a target . . . either directly or indirectly of the alleged criminal conduct, and his discharge cannot provide the basis for RICO standing. . . . Diamond's discharge was not sufficiently linked to the predicate acts that comprised the pattern of racketeering activity."

". . . [Diamond] charges only that appellees fired him 'to punish him for his opposition to the plan . . . [and] to eliminate opposition by the officers and directors to that plan . . . [and] to intimidate and prevent

> other Robertshaw officers and directors from opposing the . . . plan. (Complaint ¶12)"
>
> "We will affirm the district court's dismissal of Diamond's RICO claim. None of the allegations in Diamond's complaint are sufficient to grant him standing under the provisions of RICO." Diamond v. Reynolds, 3rd Cir., June 22, 1988.

The Third Circuit in Diamond misconstrued Sedima as turning the law inside-out by stripping standing from those victims who had previously had it, those with "racketeering injury" or "indirect injury".

CONFLICT WITH SEDIMA

The Court of Appeals Decision conflicts with this Court's decision in Sedima.

The Sedima Case

That the Court of Appeals decision conflicts with Sedima can be seen from an examination of the context in which the Sedima opinion was written and the words of the opinion, especially footnote 15, at p. 497. The context in which the Supreme Court wrote Sedima can be seen from the summary in Sedima, p. 484-485:

The District Court had held that to be compensable under RICO, 18 U.S.C. 1964(c), Sedima's injury "must be somehow different in kind from the direct injury resulting from the predicate acts of racketeering activity", it must be a "RICO-type injury', a "distinct

'racketeering injury', or a 'competitive injury'.", and therefore dismissed the RICO claim when "it found 'no allegation here of any injury apart from that which would result directly from the alleged predicate acts of mail fraud and wire fraud'." Sedima, at 484. There was to be no standing for those directly injured by the predicate acts.

The Court of Appeals affirmed the dismissal of Sedima's complaint, holding that under RICO, 18 U.S.C. 1964(c), "a RICO plaintiff must allege a 'racketeering injury' -- an injury different in kind from that occurring as a result of the predicate acts themselves, or not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter'." Sedima at 485. The Court of Appeals held that there was to be no

standing for those directly injured by the predicate acts.

The Chief Judge of the Second Circuit, Judge Feinberg, recently summarized the context in which the Sedima opinion was written:

> "In the opinion under review in Sedima, [the Second Circuit] had held (by analogy to the antitrust injury requirement of the Clayton Act), that civil RICO allowed recovery only for damages caused by 'racketeering injury' -- an injury 'not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter', like the infiltration of the legitimate economy by racketeers. 741 F.2d 482, 496 (2d Cir. 1984)."
>
> "The Supreme Court reversed and allowed recovery for injury directly caused by the predicate acts, explaining that Congress did not intend to import into RICO all of the restrictive anti-trust standing requirements. Justices Marshall, Brennan, Blackmun and Powell dissented in Sedima because they would have allowed recovery only for racketeering injury. They reasoned that 'Congress' concern was not for the direct victims . . . whom state and federal law already protected, but for the competitors and investors whose businesses and interests are

> harmed . . . or whose competitive positions decline because of infiltration in the relevant market'. 473 U.S. at 519 (Marshall, J., dissenting). The majority evidently agreed that at least some kinds of direct injury are recoverable, since they stated that 'damages include, but are not limited to, the sort of competitive injury for which the dissenters allow recovery'. 473 U.S. 497, n.15. However, the facts of Sedima did not require either the majority or the dissent to consider the limits on either direct or indirect recovery. That is the question presented here." Sperber at p. 62. (emphasis supplied)
>
> "We therefore assume, without so holding, that all of Justice Marshall's plaintiffs can recover." Sperber at p. 63.

In Sedima this Court read RICO broadly and decided to thereafter grant RICO standing to those victims directly injured by the predicate acts. But all nine justices agreed that those victims injured indirectly by the racketeering, i.e., those with "racketeering injury", "indirect injury", or "competitive injury" had standing, and would continue

to have standing, under RICO, see Sedima, p. 497, footnote 15.

The Supreme Court in Sedima held that:

> "The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity. See also n. 10, supra" Sedima, 498.

This Court expanded the breadth of RICO standing by striking down a restrictive "racketeering injury" requirement finding that:

> "in borrowing its 'racketeering injury requirement' from antitrust standing principles, the court below created exactly the problems Congress sought to avoid", i.e., "'inappropriate and unnecessary obstacles' . . . 'setting strict requirements on questions such as "standing to sue" and "proximate cause". 115 Cong. Rec. 6995 (1969)." Sedima, 498, 499.

The Supreme Court held in Sedima that henceforth victims with direct injury would be compensable as well as victims with indirect injury whose

compensability was unquestioned and assumed. Sedima, p. 497, footnote 15.

This Court in Footnote 15 of Sedima, p. 497, said of damages recoverable under RICO:

> "Such damages include but are not limited to the sort of competitive injury for which the dissenters would allow recovery. See post at 521-522".

Therefore, all nine members of the Court agreed in Sedima that RICO covers indirect injury, for this is what the dissenters discussed on p. 521-522, which was approved by all nine Justices.

The three examples on p. 521-522 of Sedima are not exclusive and do not exhaust the list of potential plaintiffs, Sedima, p. 523, but are designed simply to illustrate the types of injuries that civil RICO was designed to compensate, injury that all nine justices agreed were

recoverable under RICO, see footnote 15, p. 497.

Examining Justice Marshall's examples of victims with RICO standing will show that under Sedima, Diamond has standing:

Justice Marshall's examples:

First: If a racketeer uses arson, to force competitors out of business, purchasers of the racketeer's goods, forced to buy at higher prices, have RICO standing. Sedima, 521.

(But the dissenters, unlike the majority, would have disallowed RICO standing to the direct targets of the predicate acts who could not recover under RICO for damages flowing from the predicate acts.)

Second: If a racketeer uses arson, or other predicate acts, to force a businessman to hire certain workers, or

if the businessman hires those workers in reaction to seeing arson against other businessmen, then the businessman could sue for the injury to his business which resulted from the added labor costs. Sedima, 521, 522.

(But the dissenters, unlike the majority, would have disallowed recovery under RICO for the direct damage caused by the predicate acts, i.e., the cost of the burned building.)

Third: If a racketeer uses fraud, or other predicate acts, to obtain control of a business, and then conducts its business through a pattern of racketeering activity, competitors have RICO standing for injury by reason of the enhanced commercial position of the racketeer. Sedima, 522.

(But the dissenters, unlike the majority, would have disallowed RICO

standing for the direct victims of the fraud.)

Also, if an infiltrated business operates a legitimate business to a businessman's competitive disadvantage because of the enterprise's strong economic base derived from predicate acts, the competitor could bring a RICO action for injury to his competitive position.

(But the dissenters, unlike the majority, would have disallowed RICO standing to direct victims of the predicate acts.)

The Second Circuit agreed with all nine Justices that all the plaintiffs in Justice Marshall's examples have RICO standing: "We therefore, assume, without so holding that all of Justice Marshall's plaintiffs can recover." Sperber, at 64.

This Court emphasized that both those directly as well as those indirectly injured will henceforth have standing under RICO, Sedima, 497 fn.15.:

> "Under the dissent's reading of the statute, the harm proximately caused by the forbidden conduct is not compensable, but that ultimately and indirectly flowing therefrom is. We reject this topsy-turvy approach, finding no warrant in the language or the history of the statute for denying recovery thereunder to 'the direct victims of the [racketeering] activity,' post. at 522, while preserving it for the indirect. Even the court below was not that grudging. It would apparently have allowed recovery for both the direct and the ultimate harm flowing from the defendant's conduct, requiring injury 'not simply caused by the predicate acts, but also caused by an activity which RICO was designed to deter'." 741 F.2d at 496 (emphasis supplied)."

Sedima, far from signaling a narrowing of the permissible scope of RICO actions, rejected the imposition of any artificial limitations on the ability of a plaintiff to bring suit under that law, and broadened RICO so as to allow

standing in cases like Sedima, which until then were considered to be garden fraud cases, lacking special "RICO injury".

In Sedima, the Court cited with approval the Seventh Circuit's observations on standing in Haroco, Inc. v. American National Bank & Trust Co. of Chicago, 747 F.2d 384 (1984). [Haroco was affirmed on the same day the Second Circuit's Sedima decision was reversed. 473 U.S. 606 (1985)] In Haroco, the Seventh Circuit had stated:

> "As we read this 'by reason of' language [in section 1964(c)], it simply imposes a proximate cause requirement on plaintiffs. The criminal conduct in violation of section 1962 must, directly or indirectly, have injured the plaintiff's business or property. A defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured. This causation requirement might not be subtle, elegant or imaginative, but we believe it is

based on a straightforward reading of the statute as Congress intended it to be read. (emphasis supplied)

747 F.2d at 398.

This Court emphasized that RICO is to be read broadly, and certainly more broadly than the dissenters who, at 521, 522, wanted to restrict standing to only those with indirect injury.

"This less restrictive reading is amply supported by our prior cases and the general principles surrounding this statute. RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, see United States v. Turkette, 452 U.S. 576, 586-587 (1981), but also of its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes,' Pub. L. 91-452, §904(a), 84 Stat. 947. The statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity. See also n. 10, supra. Far from effectuating these purposes, the narrow readings offered by the dissenters and the court below would in effect eliminate §1964(c) from the statute." Sedima, 497-498. (emphasis supplied)

The Third Circuit Erred

When one compares these examples of Justice Marshall's in Sedima with the Diamond complaint one can see that if these putative plaintiffs would be given RICO standing by all nine justices, then certainly Diamond should.

Diamond, an officer and director, had a duty to protect his company and his shareholders from the racketeering scheme. The defendants knew this and fired him to advance their scheme.

Petitioner's injury flowed from the defendants' violations of §1962 including their conspiring to, and their committing a pattern of racketeering activity in connection with the conduct of an enterprise. The defendants' violations of §1962 included engaging in an overall scheme, their commission of predicate acts, their covering up of those RICO

violations, and their firing an officer and director who opposed their racketeering. Diamond's injury is sufficiently related to defendants' illegal conduct to enable him to maintain this action under the language of RICO and a fair reading of Sedima.

For a crime to be successful, it or its perpetrators must go undetected. Secrecy is part of the crime. Thus, an employee who opposes a criminal conspiracy and is therefore terminated is, in a real sense, a victim of the crime because his termination is part of the effort to commit or conceal the crime. This is especially true of an officer and director, like Diamond, who as the racketeers knew is duty-bound to oppose their crimes; his injury is a result of the conduct constituting the RICO violation.

CONFLICT WITH SEDIMA

Permitting an employee who is terminated to further a criminal conspiracy, to sue under RICO is entirely consistent with the language of RICO, with this Court's decision in Sedima, and advances the objective of the statute. If RICO's private civil action provision were enacted to empower victims as private attorneys-general to enforce the statute, who better deserves a cause of action than a person injured because he did his duty and attempted to oppose the criminal activity. Indeed, an officer and director is in a better position than many of his employer's customers or competitors (putative RICO plaintiffs) to detect and oppose the illegal activity before it spreads.

An examination of the three examples in Sedima, p. 521-522 that all nine Justices felt had RICO standing, see

footnote 15, shows standing to be allowed by Sedima to those much further from the activities of the racketeers. Those examples allow standing to those injured even if they were not targets of the predicate acts, were not known to the perpetrators of the predicate acts, and were not identified as opposing the the RICO violations and the conspiracy to commit violations of RICO. Here Diamond had a duty to defend his shareholders, a fiduciary duty to interpose himself between those racketeers, seeking to injure his shareholders, and the racketeers' objective, the controlling of his company and the defrauding of his shareholders.

Prior to the decision of the Court of Appeals in Diamond v. Reynolds, another court had considered a case like Diamond and like Callan. That case was

Acampora v. Boise Cascade Corp., 635 F.Supp. 66 (D.N.J. 1986). In that case the court analyzed Callan (which the District Court said would have granted Diamond standing) and found that the Sedima decision had not limited standing in a case like Callan:

> "Plaintiff does not allege that she was injured directly by defendant['s] stealing activities (the predicate offenses). Her injury, however, flowed from defendant's commission of a pattern of racketeering activity . . ."
>
> ". . . defendant, in his position as a manager in the corporation engaged in an overall scheme which consisted of the commission of the predicate acts and the cover-up of those activities, which caused plaintiff to lose her job. In a similar case, Callan . . ., the court found that while the predicate offense, commercial bribery, did not cause injury to plaintiff, the loss of plaintiff's employment for refusing to participate in bribe schemes was compensable under RICO as an injury 'by reason of' a violation of §1962. We are persuaded that [Acampora's] alleged injury is sufficiently related to defendant's alleged illegal conduct to enable her to

maintain this action." Acampora at 69.

Recently confronted with an analogous fact pattern the court in Williams, described why an employee, who like Diamond was also an officer, has RICO standing under Sedima:

> "I think the basis for the ruling will become clearer if we consider the application of the principles applied here to a different fact situation."
>
> "Suppose several racketeers were to decide to take over a construction company. Suppose they said, 'Let's agree to operate this company in violation of the law. Let's rig bids, bribe officials, intimidate and threaten competitors not to bid on jobs and let's travel in interstate commerce to accomplish all of this. And, oh yes, let's fire all of the honest employees in the company, so we won't have any opposition in accomplishing our scheme.'"
>
> "Although the fact pattern is different here, the causal relationships are similar. The court believes that Congress intended to afford the discharged employees a civil remedy in such a situation and

> that the Supreme Court following Sedima would so interpret the RICO statute."

Williams v. Hall, 683 F.Supp. 639, 644 (E.D. Ky. 1988).

The decision of the Third Circuit was contrary to Sedima, and the words, spirit and intent of the RICO statute.

RECURRING PROBLEM

The fact pattern in Diamond is typical of a large number of cases frequently presented to the federal courts in which it is alleged that the management of a company is operating it through a pattern of racketeering activity and an employee has been fired for opposing or exposing such violations of RICO. The opinions in these cases are conflicting and the courts need guidance:

Among the published cases with this fact pattern are:

Acampora - standing allowed

Burdick - no standing

Callan - standing allowed

Cullom - no standing

Komm - standing allowed

Morast - no standing

Nodine - no standing

Pujol - no standing

Williams - standing allowed

CONCLUSION

Certiorari should be granted to resolve the conflict among nine Circuit Courts of Appeal as to whether or not Sedima eliminated standing for RICO victims with "racketeering" or "indirect" injury, because the Third Circuit's decision affirming the dismissal on the pleadings of the RICO Counts of the complaint in Diamond v. Reynolds conflicted with this Court's decision in Sedima, and because the fact pattern in this case is being frequently presented to the federal courts and is resulting in conflicting decisions.

Respectfully submitted,

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September 19, 1988

APPENDIX A

THIRD CIRCUIT
OPINION

Diamond v. Reynolds

THIRD CIRCUIT OPINION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3643

PATRICK H. DIAMOND

Appellant

v.

DAVID P. REYNOLDS, REYNOLDS METALS COMPANY, RALPH S. THOMAS and ROBERTSHAW CONTROLS CO.

Appellees

On Appeal from the United States District Court for the District of Delaware

(D.C. Civil Action No. 84-0280)

Argued April 13, 1988

Before: BECKER, HUTCHINSON and SCIRICA, Circuit Judges

(Filed June 22, 1988)

THIRD CIRCUIT OPINION

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OPINION OF THE COURT

SCIRICA, Circuit Judge

This appeal presents several issues

stemming from appellant Patrick Diamond's suit relating to his discharge as an officer and director of Robertshaw Controls Co. ("ROB"). For reasons that follow, we will affirm the district court's thorough treatment of this case, with the exception of its entry of judgment in the amount of $72,900 for appellees on the counterclaim alleging that Diamond breached an employment termination agreement.

Although the factual circumstances giving rise to Diamond's claim span a period of several years, the following summary sets forth the essential elements of the parties' dispute. Diamond was chief financial officer and a director of ROB, and also served on a ROB committee established to monitor takeover attempts. Reynolds Metals Co. had formed ROB in the

1940s and had retained a thirty percent interest. The chairman and chief executive officer of Reynolds Metals, appellee David Reynolds, also served as chairman of ROB. In addition, three of ROB's fifteen directors were employees of Reynolds Metals.

In 1983, appellee Ralph Thomas, ROB's chief executive officer, dismissed Diamond. On March 15, 1984, Diamond filed suit, alleging that he was fired because he objected to and sought to prevent appellees from implementing a plan that would allow Reynolds Metals and David Reynolds to acquire control of ROB by purchasing stock at a price lower than shareholders could receive on the open market without appellees' interference. He contends that Reynolds Metals, Reynolds, ROB, and Thomas, ROB's chief

executive officer, conspired to allow Reynolds Metals to control ROB directors' meetings and dominate and direct ROB affairs. Diamond alleges that appellees' plan prevented a friendly takeover of ROB by other corporations and permitted Reynolds Metals to proceed with plans to increase its ownership interest in ROB.

The district court dismissed part of Diamond's complaint, holding that: (1) he did not have standing to sue under the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. § 1962; and (2) he did not state a claim for wrongful discharge because Virginia law recognizes only a limited exception to the employment-at-will doctrine, which the court held was inapplicable. After denying as untimely Diamond's motion for a jury trial, the court conducted a bench

trial, and entered judgment, finding that: (1) ROB did not breach its severance agreement with Diamond; (2) ROB did not breach its termination agreement with Diamond; and (3) Diamond materially breached the termination agreement and ROB is entitled to $72,900 on its counterclaim.

Diamond appeals each aspect of the court's rulings. We will affirm the district court's denial of Diamond's request for a jury trial because the district judge did not abuse his discretion by denying the request as untimely. Similarly, we will affirm the district court's entry of judgment against Diamond on his claim that ROB breached the severance agreement. We find no clear error in the district judge's factual findings that Reynolds

Metals did not obtain control of ROB in the manner that would have permitted Diamond to collect payment under the severance agreement. The district judge based his holding on credibility determinations, the demeanor of witnesses and uncontradicted testimony. Those findings, of course, are entitled to deference. Moreover, the district court's legal conclusions are supported by law. We now turn to Diamond's other claims.

I. RICO

In dismissing Diamond's RICO claim, the district court concluded that Diamond had no standing because he could not establish that his injury (retaliatory discharge) was connected to the predicate acts of mail fraud that constituted the alleged RICO violation. We agree.

Pursuant to § 1964(c), Diamond must be injured "by reason of a violation of § 1962." In Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 (1985), the Supreme Court interpreted this provision as requiring an injury by the specific conduct that constitutes the violation. We recently concluded that "the injury which confers standing on a RICO plaintiff is injury flowing from the commission of the predicate act, not injury flowing from the pattern of such acts." Town of Kearny v. Hudson Meadows Urban Renewal, 829 F.2d 1263, 1268 (3d Cir. 1987) (citing Sedima, 473 U.S. at 495). Here, Diamond's dismissal did not flow from the commission of the predicate acts, which involved mailings to ROB shareholders concerning the acquisition of ROB stock.

To be sure, Diamond contends that his firing was a consequence of his opposition to appellee's plan to control ROB. Yet, whether Diamond was discharged in retaliation for objecting to the alleged conspiracy or to prevent him from reporting the conspiracy, he does not have RICO standing. See Pujol v. Shearson, 829 F.2d 1201, 1205 (1st Cir. 1987); Nodine v. Textron, 819 F.2d 347, 348 (1st Cir. 1987); Morast v. Lance, 807 F.2d 926, 929 (11th Cir. 1987).[1] Diamond was not a target -- either directly or indirectly -- of the alleged criminal conduct, and his discharge cannot provide the basis for RICO standing. The district court properly held that Diamond's discharge was not

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[1]But see Williams v. Hall, No. 84-149 (E.D. Ky. April 5, 1988) (available on LEXIS, Genfed library, Dist file).

sufficiently linked to the predicate acts that comprised the pattern of racketeering activity.

Moreover, Diamond has not plead that he was dismissed for refusing to join the alleged conspiracy. Although he raises that contention on appeal, Diamond never claimed that: (1) appellees solicited his membership in the scheme; or (2) he refused their offer.[2] Rather, he charges only that appellees fired him "to punish him for his opposition to the plan . . . [and] to eliminate opposition by the officers and directors to that plan . . . [and] to intimidate and prevent other Robertshaw officers and directors

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[2]Because we are not presented with such an allegation, we have no occasion to state whether such a claim would confer RICO standing to someone in Diamond's position.

from opposing the . . . plan." App. at 899 (complaint ¶ 12).

Accordingly, we will affirm the district court's dismissal of Diamond's RICO claim. None of the allegations in Diamond's complaint are sufficient to grant him standing under the provisions of RICO.

II. Wrongful Discharge

Applying Virginia law, the district court concluded that Diamond's wrongful discharge claim "did not fall within the narrow confines of the tort as it exists in Virginia." The court noted that Virginia follows the common law doctrine of employment-at-will unless plaintiff can establish he has been discharged in violation of public policy. Relying on Bowman v. State Bank of Keysville, 229 Va. 534, 539, 331 S.E.2d 797, 801 (1985),

the court concluded that Diamond had not identified a right protected as a matter of "established public policy".

In Bowman, the Virginia Supreme Court held that a bank employee could not be discharged for exercising her statutory right to vote her shares of bank stock free of duress and intimidation of bank management. Id. The court in Bowman identified a Virginia statute that codified a shareholder's independent voting right. Id. Appellees contend that the district court correctly applied Virginia law because Diamond has failed to identify any current provision of the Virginia Code that codifies the right of a corporate director to independently exercise his voting discretion.

THIRD CIRCUIT OPINION

We question whether a corporate director's duty to serve the best interests of shareholders does not constitute a public policy as important as a shareholder's right to vote, but like the district court, we are bound by the constrairts of Virginia law. Although the court in Bowman "did not state whether its holding applies only to public policies that are embodied in statutes ...", see Woodring v. Board of Grand Trustees, 633 F. Supp. 583, 595 (W.D. Va. 1986), the Virginia Supreme Court recently clarified Bowman.

In Miller v. Sevamp, Inc., 234 Va. 462, ---, 362 S.E.2d 915, 918-19 (1987), the court emphasized the limited nature of the Bowman exception to the employment-at-will rule.

> Bowman recognized an exception to the employment-at-will doctrine limited to discharges which violate public policy, that is, the policy underlying existing laws designed to protect the property rights, personal freedoms, health, safety, or welfare of the people in general. Each of the illustrative cases from other jurisdictions cited in Bowman involved violation of public policies of that character ... Recognizing that the common law fails to provide a generalized cause of action for 'retaliatory discharge,' the General Assembly has enacted statutes which permit such actions in precisely defined circumstances ...

Id. at ---, 362 S.E.2d at 918 (emphasis in original). The court concluded that because a change in the employment-at-will doctrine would involve serious policy considerations, "any substantial alteration of the doctrine" must be made pursuant "to the deliberative processes of the General Assembly." Id. at ---, 362 S.E.2d at 919.

Thus, the unmistakable signal from the Virginia Supreme Court is that the

public policy exception to the employment-at-will doctrine must be based on express legislative action. Diamond has identified no statutory provision justifying departure from Virginia's employment-at-will rule. Accordingly, we will affirm the judgment of the district court on the issue.

III. Diamond's Breach of the Termination Agreement

Before Diamond's dismissal from ROB, appellee Thomas sent a letter outlining the terms of Diamond's "resignation." See J.A. at 2365-66. Diamond signed the letter in a section indicating his agreement to the terms. The letter provided that "[i]n recognition for" Diamond's past contribution to ROB and "future loyalty," ROB agreed to: (1) pay Diamond an executive bonus for 1983, and his regular base salary for the remainder

of 1983 and for 1984; (2) provide insurance benefits for the same period; (3) supply limited secretarial services and the use of a Lincoln Town Car until June 1, 1984; and (4) provide up to $25,000 in job placement services. The agreement further provided:

> As long as your salary continues though, you will not accept employment with a competitor, direct or indirect, of Robertshaw nor will you compete with Robertshaw, directly or indirectly, as an individual, in a partnership or in any other manner. You will not remove or retain any Robertshaw data or files and will return any data or files which you may have in your personal possession.

Id.

Diamond, however, retained ROB documents -- primarily copies of cancelled checks from ROb's quality discount program -- that he had removed before his departure from the

company.[3] The cancelled checks represented payments ROB had made in 1978-80 to its major customers as part of a price discount program. Diamond said he was ordered to examine the check endorsements to ensure that the payments, which were delivered to purchasing agents, were reaching the customers. He testified that he retained copies of the checks to establish his diligence in the event his work was questioned, and to protect himself from possible antitrust-related charges. The district court held

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[3]Diamond also retained about 2,500 pages of ROB documents packed in cartons, which, he said, his secretary instructed him to remove upon his dismissal. Diamond stated that he never knew the documents were in the cartons. The district court credited Diamond's unrebutted testimony that he was not aware of the documents and that he removed the cartons only because he believed ROB officials had so ordered. We have no reason to question this finding.

that Diamond breached the termination agreement by intentionally retaining copies of the cancelled checks. Accordingly, it held that ROB was relieved of its obligations under the contract, and it entered judgment for ROB in the amount of $32,400 (the amount of Diamond's 1983 bonus paid to him) and $40,500 (the amount of Diamond's salary payments between the time of his discharge and his breach of the termination agreement).

In reviewing the district court's decision, we must first determine whether it is based on the court's interpretation or construction of the termination agreement. Contract interpretation is a question of fact and our standard of review is clearly erroneous; whereas, contract construction is a question of

law and our review is plenary. See John F. Harkins Co., Inc. v. Waldinger Corp., 796 F.2d 657, 659 (3d Cir. 1986), cert, denied 107 S. Ct. 939 (1987); Ram const. Co. v. American States Ins. Co., 749 F.2d 1049, 1052-53 (3d Cir. 1984). Distinguishing between interpretation and construction, however, is no easy task. John F. Harkins Co., 796 F.2d at 659.

Interpretation of contractual language occurs when a court determines "what ideas the language induces in other persons." Id. (citing 3 Corbin, Corbin on Contracts § 534, at 9 (1960)). It is "the process of applying the legal standard to expressions found in the agreement in order to determine their meaning." 4 W. Jaeger, Williston on Contracts § 602, at 320 (1961).

construction, meanwhile, determines the legal meaning of the contract -- a process that goes beyond determining the meaning of the words or symbols used in the agreement. Id. "In determining the legal effect an agreement will have on an event the parties did not foresee, the process is construction, not interpretation." Ram, 749 F.2d at 1053 (citing Corbin on Contract § 534, at 9). Unlike interpretation, construction is a process from which legal consequences "are made to follow...from a legal policy or policies that are applicable to the situation." Patterson, The Interpretation and Construction of Contracts, 64 Colum. L. Rev. 833, 835 (1964). For example, when a court enforces a contract based on the doctrine of unjust enrichment; construes a

contractual provision against an insurer, or declines to enforce a provision as unconscionable, the process is construction, not interpretation. See id. Each of those functions requires resort to legal principles beyond the threshold task of ascertaining the intent of the parties.

Here, the district judge examined the contractual language to determine whether Diamond's removal and retention of ROB materials constituted a material breach that excused ROB from performance. In so doing, the court examined contractual language to ascertain whether Diamond's breach violated an essential term "significant enough to amount to the nonoccurrence of a constructive condition of exchange." See E. Farnsworth, contract § 8.16, at 611 (1981).

Determining the materiality of a party's reach does not require resort to legal policy' rather the court must simply read the agreement and ascertain whether noncompliance with an undisputed term constitutes a failure of performance. See Patterson, supra, 64 Colum. L. Rev. at 834; accord Sahadi v. Continental Ill. Nat. Bank & Trust Co., 706 F.2d 193, 196 (7th Cir. 1983) (materiality of a breach is a "complicated question of fact"); E. Fransworth, supra § 8.16, at 612 ("Whether a breach is material is a question of fact.").

Based on the foregoing, we conclude that the district court engaged in contract interpretation. Accordingly, we review the court's holding that Diamond's breach was material under a clearly erroneous standard.

In assessing the materiality of a breach, we must examine a variety of circumstances. See R.G. Pope Constr. Co. v Guard Rail of Roanoke, 219- Va. 111, ---, 244 A.E.2d 774, 778 (1978); Restatement (Second) of Contracts, § 241, at 237 (1981). The most significant circumstance, however, is "the extent to which the breach will deprive the injured party of the benefit that he justifiably expected from the exchange." E. Farnsworth, supra § 8.16, at 612; see also Restatement (Second) of Contracts § 241(a). Under Virginia law, a material breach must be "of a substantial nature as to defeat the object of the parties . . . or the purpose of the instrument." Sternheimer v. Sternheimer, 208 Va. 89, ---, 155 S.E.2d 41, 47 (1967) (citing Bolling v. King Coal Theatres,

185 Va. 991, 996, 41 S.E.2d 59, 62 (1947)).

Upon examining the contract language, the district court concluded that Diamond's retention of ROB records deprived ROB of one of the benefits it justifiably expected. We question this literal reading of the contract terms. Indeed, were we deciding the issue de novo, we might be inclined to find that the provision barring Diamond from retaining ROB documents was a means of effectuating the essential purpose of the contract, i.e., noncompetition. It is this object -- Diamond's noncompetition[4] -- that we would find was the "purpose of the instrument." See Sternheimer, 208 Va. at ---, 155 S.E.2d at 47.

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[4]Diamond fully performed this portion of his obligation.

THIRD CIRCUIT OPINION

Mindful of our scope of review, however, we are unable to find clear error in the district court's interpretation that the contractual provision relating to ROB records was also a material object of the parties. Our function is not to "decide factual issues de novo," and we must not reverse because we would have decided or weighed factual questions differently. Anderson v. City of Bessemer, 470 U.S. 564, 573, 574 (1985); see also Leeper v. United States, 756 F.2d 300, 308 (3d Cir. 1985). Rather, we must determine whether "the district court's account of the evidence is plausible in light of the record viewed in its entirety." Anderson, 470 U.S. at 574. This standard applies to findings based on physical and

documentary evidence as well as to credibility determinations. Id.

Here, the district court found that the contract's express language barred Diamond from competing with ROB directly or indirectly and from retaining ROB records. (emphasis supplied) The district court apparently concluded that the parties envisioned these requirements as dual conditions to ROB's promises to continue paying Diamond's salary and benefits. Although we may have interpreted the contract differently, we cannot hold that the district court's interpretation was not plausible and supported by the record.

Nevertheless, the district court erred by not requiring ROB to prove any damages from the breach. ALthough ROB need not establish its damages with

precision, it must come forward with "an intelligent and reasonable estimate." United Virginia Bank of Fairfax v. Dick Herriman Ford, Inc., 215 Va. 373, ---, 210 S.E.2d 158, 161 (1974); see Crist v. Metropolitan Mortg. Fund, Inc., 231 Va. 190, ---, 343 S.E.2d 308, 311 (1986). The court apparently concluded that Diamond's breach entitled ROB to collect reliance damages for the total amount of the salary ROB paid Diamond during the period of the contract. See J.A. at 2438 (district court opinion (citing Restatement (Second) of Contracts § 243 (effect of a breach by non-performance as giving rise to a claim for damages for total breach); E. Farnsworth, supra § 12.16 (reliance as an alternative measure of damages)).

ROB acknowledges that it is unable to prove damages with sufficient certainty. See Transcript of Oral Argument, April 13, 1988 ("Candidly, your Honor, we were not damaged in the sense that we could point to monetary damages.") In its decision, the district court turned to a reliance measure of damages. We disagree, however, with the use of a reliance measure of damages, and also with the court's determination that Diamond's breach of the contract's record-return requirement required him to return all benefits he had previously received from ROB.

Both reliance and restitution measures are appropriately employed when "expectancy is uncertain or difficult to prove" See D. Dobbs, Remedies § 12.1, at 787 (1973). Generally, restitution

applies when the nonbreaching party who has partly performed seeks "the value of his performance," id., or when the breaching party has been "unjustly enriched as a result of some benefit conferred under the agreement." Restatement (Second) of Contracts § 344 comment d; Id. at 199 (introductory note). Reliance damages, however, allow a party to recover money spent preparing to perform the contract or preparing to accept the fruits of the contract. D. Dobbs, supra § 12.1, at 787; Restatement (Second of Contracts § 349. In this case, ROB attempted to recover the money it paid Diamond in return for his promise not to retain ROB records. ROB did not seek damages for efforts it made, or expenses it incurred, in preparation for Diamond's performance. Therefore, rather

than a reliance theory, we believe a restitution analysis is more appropriate.

If the contract had been fully performed, ROB would have paid Diamond for two years, but also received a benefit from his forbearance for agreeing not to compete for two years and his promise to return ROB records. ALthough Diamond's retention of ROB records constituted a material breach justifying ROB's suspension of performance, see Restatement (Second) of Contracts § 243 & comment a, Diamond complied with all other conditions, i.e., noncompetition requirements, imposed by ROB.

Using a restitution measure of damages, ROB is entitled to recover only the value of the benefit it conferred on Diamond by payments it made under the contract. See D. Dobbs, supra § 12.1, at

791; Restatement (Second) of Contracts § 344(c). To this extent, the damage award prevents Diamond -- the breaching party -- from unjust enrichment. Yet, ROB's damages must not exceed the amount necessary to put it"back in the position [it] would have been in if the contract had not been made." E. Farnsworth, supra § 12.19, at 905. Here, Diamond's breach of the record-return clause was material, but he also fully performed the noncompetition aspect of the agreement. Thus, ROB is "entitled to restitution only upon returning or in some way accounting for the value of performance [it] received." 1 G. Palmer, The Law of Restitution § 4.5, at 410 (1978).

Any other result would grant ROB a windfall by allowing it to reap the benefit of Diamond's forbearance from

competition, and at the same time require Diamond to forfeit all payments received in exchange for that forbearance. An affirmance of ROB's damage award of $72,900 in damages paid by ROB to Diamond represented the value to ROB of Diamond's compliance with the noncompetition clause of the contract. Therefore, under a restitution theory, we must disgorge ROB of the benefit it gained from Diamond' forbearance from competition.

We recognize that measuring the value of Diamond's performance is no simple task. Nevertheless, because restitution is based on preventing unjust enrichment and guaranteeing substantial justice, we will remand to the district court for an assessment of the value received by ROB from Diamond's

performance of the noncompetition aspect of the agreement.

Accordingly, we will affirm in part the district court's entry of judgment on the counterclaim. We will reverse in part the court's award of damages totalling $72,900, and remand to allow the district court to adjust ROB's damage award to reflect the extent of Diamond's performance under the agreement.

Each party shall bear its own costs.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

DATED:

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-3643

PATRICK H. DIAMOND, Appellant

vs.

DAVID P. REYNOLDS, REYNOLDS METALS COMPANY, RALPH S. THOMAS and ROBERTSHAW CONTROLS CO.

(D.C. Civ. No. 84-0280)

ON APPEAL FROM THE UNITED STATES DISCRICT COURT FOR THE -- DISTRICT OF DELAWARE

Present: BECKER, HUTCHINSON and SCIRICA, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the -- District of Delaware and was argued by counsel April 13, 1988.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered August 28, 1987, be and the same is hereby affirmed in part and

reversed insofar as the award of damages totalling $72,900, and the cause is remanded to the said District Court to allow the Court to adjust ROB's damage award to reflect the extent of Diamond's performance under the agreement. Each party to bear its own costs.

ATTEST:

Clerk

June 22, 1988

APPENDIX B

DISTRICT COURT
OPINION

Diamond v. Reynolds

January 13, 1986
July 15, 1986

District Court 1/13/86

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

PATRICK H. DIAMOND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 84-280
DAVID P. REYNOLDS, REYNOLDS METALS COMPANY, RALPH S. THOMAS, and ROBERTSHAW CONTROLS COMPANY,	)	MMS
	)	
	)	
	)	
Defendants,		

William Prickett, Esq., and Norman L. Pernick, Esq., of Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, Delaware; Of Counsel: Harold E. Kohn, Esq., William B. Lytton, Esq., and Mary E. Kohart, Esq., of Kohn, Savett, Marion & Graf, P.C., Philadelphia, Pennsylvania; attorneys for plaintiff.

Arthur G. Connolly, Jr., Esq., of Connolly, Bove, Lodge & Hutz, Wilmington, Delaware, Of Counsel: Jeffrey Barist, Esq., Kathryn L. Bedke, Esq., and Juan H. Saavedra-Castro, Esq., of White & Case, New York, New York; attorneys for defendants David P. Reynolds and Reynolds Metals Company.

E. Norman Veasey, Esq., Allen M. Terrell, Jr., Esq., and Thomas A. Beck, Esq., of

District Court 1/13/86

Richards, Layton & Finger, Wilmington, Delaware; Of Counsel: Wachtell, Lipton, Rosen & Katz, New York, New York; attorneys for defendants Ralph S. Thomas and Robertshaw Controls Company.

MEMORANDUM OPINION

Dated: January 13, 1986
Wilmington, Delaware

SCHWARTZ, Chief Judge

Plaintiff Patrick Diamond has commenced this civil action alleging federal statutory violations and pendent state-law claims against defendants David P. Reynolds ("Reynolds"), Reynolds Metals Company ("Reynolds Metals"), Ralph S. Thomas ("Thomas"),[1] and Robertshaw Controls Company ("Robertshaw") for a

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[1]Thomas has been a member of the Board of Directors of Reynolds Metals and President and Chief Executive Officer of Robertshaw since 1972. Second Amended Complaint ¶4.

series of events culminating in the termination of plaintiff's employment with defendant Robertshaw. Defendants Reynolds' and Reynolds Metals' have moved to dismiss plaintiff's Second Amended Complaint or, alternatively, for a rule 11 hearing.

For the reasons that follow, defendants' motion to dismiss will be granted in part and denied in part and defendants' motion for a rule 11 hearing will be denied.

I. Facts

Plaintiff in April, 1978 assumed the position of Vice-President, Finance, at Robertshaw. In April, 1980 he became a member of Robertshaw's Board of Directors, Chairman of the Board's Finance Committee, and Chief Financial Officer.

District Court 1/13/86

On February 24, 1982 Plaintiff entered into a severance agreement with defendant Robertshaw which provided plaintiff would be entitled to termination compensation if his termination occurred within three years of a "change of control" at Robertshaw. Second Amended Complaint ¶24. "Change of control" was defined in the severance agreement as

> (i) the acquisition of a total of 30% or more of the outstanding shares of the company's common stock by an entity, person or group other than the company pursuant to a tender or exchange offer or otherwise or series of related transactions, or (ii) the election, either directly or indirectly, of more than one third of the company's board of directors by an entity, person or group (except Reynolds Metals Company or a wholly owned subsidiary). Notwithstanding the foregoing, the acquisition of shares of

> common stock by Reynolds Metals Company, or a wholly owned subsidiary, acting on its behalf shall not constitute a "Change of Control."

Id. ¶25.

Defendant Reynolds has been Chairman of the Board of Robertshaw since 1978 and Chairman of the Board and Chief Executive Officer of Reynolds Metals since 1976. Reynolds Metals as of April, 1978, owned 27 percent of the stock of Robertshaw. Reynolds and Reynolds Metals on October 25, 1983 announced the purchase by Reynolds Metals of approximately an additional ten percent of Robertshaw shares. Id. ¶49.

On November 18, 1983, plaintiff was terminated as a Robertshaw officer and director, effective November 18, 1983. See id. Ex. A (Letter from R.S. Thomas to Patrick H. Diamond (Nov. 18, 1983)).

Plaintiff has brought this lawsuit challenging his dismissal.

Plaintiff's first three counts allege that Reynolds, Reynolds [Metals] and Thomas violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§1962(b), (c), and (d), by making false and misleading statements to stockholders through the mail, thereby gaining control of Robertshaw. Second Amended Complaint ¶¶30, 52-66. Plaintiff alleges he was injured by this purportedly unlawful seizure of control when defendants discharged him. Id. ¶¶ 58, 62, & 66. In Count Four, plaintiff alleges that Reynolds tortiously interfered with the prospective contractual relation between plaintiff and Robertshaw by causing the "change of control" definition in the

contract to exclude acquisition of shares by Reynolds Metal. Id. ¶¶ 67-70. Counts Six and Seven allege that Reynolds, Thomas, and Robertshaw wrongfully discharged plaintiff in order to punish him for performing his fiduciary duties as an officer and director of Robertshaw. Id. ¶¶ 74-85.[2]

Defendants assert in their motion to dismiss that plaintiff lacks standing to bring a RICO claim against them; that plaintiff has not alleged that "but for" defendant Reynolds' conduct plaintiff's contract would have been different; and that plaintiff's discharge does not fit within the tort of wrongful discharge as it exists in Virginia.

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[2]Plaintiff in Counts Five and Eight alleges a breach-of-contract action against Robertshaw. Id. ¶¶ 71-73, 86-90. Defendants Reynolds and Reynolds Metals were not charged in these two counts.

II. Analysis

A motion to dismiss for failure to state a claim upon which relief may be granted presents an issue of law only. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-56 (1957). In passing on a motion to dismiss, a court construes the factual allegations of the complaint in the light most favorable to the plaintiff. Scheur v. Rhodes, 416 U.S. 232, 236 (1974).

A. Plaintiff's Standing to Bring a RICO Action (Counts One, Two and Three)

Defendants assert that plaintiff lacks standing to maintain his RICO claims against them. I agree.

The doctrine of standing derives from the Article III requirement that federal courts may adjudicate only actual "cases" and "controversies." Allen v. Wright, ___ U.S. ___, 104 S. Ct. 3315, 3324 (1984). "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." Warth v. Seldin, 422 U.S. 490, 498 (1975), quoted in Allen v. Wright, supra, at 3324. To establish standing, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct . . . ." Allen v. Wright, supra, at 3324. Among the questions a court must ask is whether "the line of causation between the illegal conduct and injury [is] too attenuated." Id.

To establish injury under RICO a civil plaintiff need allege only that its injury was caused by predicate acts sufficiently related to each other to constitute a pattern of racketeering activity. Sedima, S.P.R.L. v. Imrex Co., 54 U.S.L.W. 5034, 5038-39 (U.S. 1985). A party has standing to sue only if "injured in [its] business or property by the conduct constituting the violation." Id. at 5039.

Sedima simply does not support plaintiff's position. Plaintiff has alleged that defendants have committed certain acts of mail fraud in order to take over Robertshaw, thereby breaching their duty to their shareholders and violating RICO. Plaintiff alleges that "[a]s a result of the successful culmination of this scheme, the Reynolds

Defendants [Reynolds and Reynolds Metals] obtained control over Robertshaw and used that control to oust Plaintiff from his position as an officer and member of the board of directors of Robertshaw." Memorandum of Patrick H. Diamond in Opposition to the Motion of David P. Reynolds, Dkt. 74, at 14-15 (emphasis added).

The weakness of Plaintiff's argument is revealed by plaintiff's own statement of the causal nexus between the alleged mail fraud and his allegedly wrongful discharge. Under plaintiff's reasoning, any wrongful act committed by defendants after they took control of Robertshaw could be denominated an injury "as a result of" the mail fraud by which defendants allegedly gained control. According to plaintiff, if defendants had

wrongfully terminated a janitor's contract, the janitor could sue under RICO because because the defendants "used [their] control" over Robertshaw to effect the ouster.

This ludicrous example points up the fallacy in plaintiff's reasoning. Plaintiff would rob of all meaning the notion of proximate cause and would expand beyond recognition the already broad scope of RICO liability.

The proximate cause of plaintiff's allegedly wrongful discharge was defendants' act of discharging him. It is true that defendants would not be in a position to discharge plaintiff unless they had control over Robertshaw. This does not establish that defendants' "control" over Robertshaw "caused" plaintiff to be discharged, much less

that defendants' allegedly wrongful acts in taking control "caused" plaintiff to be discharged. Evidence relating to how defendants allegedly took control of Robertshaw is completely extraneous to plaintiff's claims relating to this termination of employment.

Because plaintiff has not suffered injury as a result of defendant's allegedly wrongful acts in violation of RICO, plaintiff lacks standing to maintain a RICO action against defendants. Defendants Reynolds' and Reynolds Metals' motion to dismiss as to them Counts One, Two, and Three of Plaintiff's Second Amended Complaint will be granted. Since diversity jurisdiction exists, the Court proceeds to the merits of defendants' motion to dismiss plaintiff's state-law claims.

B. The Claim Alleging Tortious Interference With Prospective Contractual Relations (Count Four)

1. Choice-of-Law Analysis

As a federal court sitting in the District of Delaware, this Court is bound to apply Delaware choice-of-law rules when deciding what law to apply in a state-law action. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487 (1941). Both the claim of tortious interference with contractual relations and of wrongful discharge are tort actions. For torts, Delaware continues to follow the lex loci delicti rule under which the law of the jurisdiction where a tort allegedly takes place (Virginia) governs the substantive rights of the parties in an action based on the tort. Friday v. Smoot, 211 A.2d 594 (Del. 1965); Tew v.

Sun Oil Co., 407 A.2d 240, 242 (Del. Super. 1979). This Court is therefore bound to follow Virginia law for both of plaintiff's state-law claims.

2. Tortious Interference With A Prospective Contract

a. The Prima Facie Case

Virginia recognizes the tort of intentional interference with a prospective contract. Allen Realty Corp. v. Holbert, ___ Va. ___, ___, 318 S.E.2d 592, 597 (Va. 1984). The tortious interference "must (1) induce or otherwise cause a third party not to enter into a prospective contract with the plaintiff, or (2) prevent the plaintiff from entering into a contract." Id. (citing 6 A.L.R. 4th 195, 201 (1981)).

Plaintiff on February 24, 1982 entered into a severance agreement with

Robertshaw. Plaintiff alleges that defendant Reynolds "demanded that an exclusion clause be inserted into the severance agreement[] making the severance agreement[] inapplicable to certain actions by Reynolds Metals Company." Second Amended Complaint, ¶22. Thus, plaintiff alleges that Reynolds induced Robertshaw not to enter into a severance agreement with the plaintiff which did not contain the exclusion provision; i.e., but for Reynolds' interference, Robertshaw would have entered into a more favorable contract with plaintiff.

The Court entertains grave doubt whether plaintiff will be able ultimately to establish tortious conduct on the part of defendant. In most instances where liability has been upheld on a claim of

tortious interference with contract, the third party has refused to enter into a contract with the plaintiff as a result of the wrongful conduct of the defendant. E.g., Yaindl v. Ingersoll-Rand Co., 281 Pa. Super. 560, 422 A.2d 611 (1980); Phillips v. Vandygriff, 711 F.2d 1217 (5th Cir. 1983)(applying Texas law); see generally, 6 A.L.R. 4th 195 et seq. Nevertheless, in a small number of cases where liability was upheld the plaintiff did enter voluntarily into a contract with the third party, although on terms allegedly more unfavorable than plaintiff would have obtained but for the interference of the defendant. See Frank Coulson, Inc.-Buick v. General Motors Corp., 488 F.2d 202 (5th. Cir. 1974) (applying Florida law); Leibovitz v.

Central Nat'l Bank, 75 Ohio App. 25, 60 N.E.2d 727 (1944).

Plaintiff voluntarily entered into a contract with Robertshaw, albeit on terms allegedly more unfavorable than he would have obtained but for the allegedly wrongful interference of defendant Reynolds. Construing, as I must, the allegations in the complaint in the light most favorable to plaintiff, plaintiff's claim appears to fit within the outer perimeters of the tort. Plaintiff has made out a prima facie case under the elements articulated by the Virginia Supreme Court in Allen Realty Co. v. Holbert, supra, and the case law from other jurisdictions would support a finding of liability under certain sets of facts. As it does not "appear[] beyond doubt that the plaintiff can prove

no set of facts in support of his claim which would entitle him to relief," Conley v. Gibson, 355 U.S. at 45-46, I must deny defendant Reynolds' motion to dismiss Count Four.

b. Defenses to the Prima Facie Case

Defendant Reynolds also claims that even if plaintiff has properly alleged against him a cause of action for tortious interference with prospective contractual relations, Reynolds cannot be held responsible because his conduct is privileged. Under the economic-interest privilege enunciated in Zoby v. American Fidelity Co., 242 F.2d 76 (4th Cir. 1957), defendant Reynolds alleges that the impetus for his conduct stems from a proper business interest and not from malice. Dkt. 72, at 35 (citing Zoby, supra, at 80). Furthermore, Reynolds

argues his conduct is privileged because as a Robertshaw director he was acting in the best interests of Robertshaw and its shareholders. Dkt. 72, at 34-35 (citing Steranko v. Inforex, Inc., 5 Mass. App. 253, 362 N.E.2d (1977), and Greyhound Corp. v. Commercial Cas. Ins. Co., 259 A.D. 317, 19 N.Y.S.2d 239 (1st Dep't 1940)).

Assuming arguendo one or more of these defenses is viable under Virginia law, the question whether Reynolds is entitled to claim a privilege cannot be resolved in a context of a motion to dismiss. A finding on defendant's assertion of privilege would require the Court to resolve a disputed factual issue. Reynolds maintains he qualifies for the privilege because he did not act out of malice, but in his own and Robertshaw's

best interest. Plaintiff claims otherwise.

The Court denies defendant Reynolds' motion to dismiss plaintiff's claim against Reynolds for tortious interference with prospective contractual relations.

C. The Claims for Wrongful Discharge (Counts Six and Seven)

Defendants claim that plaintiff's cause of action against them for wrongful discharge must fail because plaintiff's claim does not fall within the narrow confines of the tort as it exists in Virginia. I agree.

In Bowman v. State Bank, ___ Va. ___, 331 S.E.2d 797 (1985), the Virginia Supreme Court reaffirmed Virginia's adherence to the common-law rule that allows either party to terminate a contract of employment at will for any

reason or for no reason at all by giving notice of intention to terminate. Id. at 798, 800. The Virginia Supreme Court observed, however, that the Virginia legislature has made various exceptions to the employment-at-will doctrine for employees who are physically handicapped, who file safety or health complaints, or who exercise rights under the Workers' Compensation Act. Id. at 800. Moreover, the court noted that at least 20 state courts have recognized an exception to the doctrine in favor of at-will employees who claim to have been discharged in violation of public policy. Id. at 801.

Plaintiffs in Bowman were discharged for unsatisfactory job performance, but for "the proper exercise of their protected rights as shareholders," Id. at

800, conferred pursuant to Virginia Code §13.1-32. See Id. at 801. While refusing to abrogate the general rule against recognizing wrongful discharge, the Virginia Supreme Court held that the facts of the case before it stated an action in tort for wrongful discharge because plaintiffs claimed they had been discharged for exercising a statutory right. Id. at 800. This narrow exception to the employment-at-will doctrine for the exercise of a protected right is inapplicable in this case, however.

A shareholder exercising his statutory right to vote on corporate matters is exercising a personal and proprietary right; he is acting only on his own behalf and thus may exercise "unfettered discretion" in voting. See

Id. at 801. A corporate director carrying out his duties has no similar personal or proprietary "right" to carry out those duties; rather, a director has a fiduciary obligation to act on behalf of the shareholders of the corporation. A director's discretion in fulfilling his duty is bounded by that fiduciary obligation.

Since plaintiff is unable to allege that his termination violated a protected right, as required by the Virginia Supreme Court, his claim of wrongful discharge must be dismissed.[3]

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[3]Because the Court has granted defendants' motion to dismiss all but Count Four of the complaint, defendants' motion in the alternative for a rule 11 hearing cannot, by its own terms, be considered. The Court declines to grant a rule 11 hearing as to plaintiff's claim of intentional interference with

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Footnote 3 continued:

prospective contractual relations because the Court has found plaintiff's allegations sufficient as a matter of law. Defendants may renew their motion at a later stage of the proceedings.

Defendant Reynolds also seeks a rule 11 hearing with respect to plaintiff's breach of contract claims in his Amended Complaint. In the Amended Complaint, filed on July 12, 1984, plaintiff charged Reynolds with breaching plaintiff's severance agreement. Amended Complaint, Dkt. 31, Counts Five & Eight, ¶¶51-53 & 66-70. Plaintiff's counsel acknowledged at oral argument before this Court in July, 1984 that Reynolds was not a party to plaintiff's severance agreement with Robertshaw, TRO Tr. 37, and in plaintiff's Second Amended Complaint the breach-of-contract claim against Reynolds was dropped. The Court does not believe the purposes of justice or of judicial economy would be served by holding a hearing.

IV. Conclusion

The Court grants defendants Reynolds' and Reynolds Metals' motion to dismiss as to them Counts One, Two, Three, Six, and Seven of plaintiff's Second Amended Complaint and denies defendant Reynolds' motion to dismiss Count Four. The Court denies defendants' motion for a rule 11 hearing.

District Court 1/13/86

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

PATRICK H. DIAMOND, Plaintiff,	)	
v.	)	Civil Action No. 84-280 MMS
DAVID P. REYNOLDS, REYNOLDS METALS COMPANY, RALPH S. THOMAS, and ROBERTSHAW CONTROLS COMPANY, Defendants,	)	

O R D E R

At Wilmington this 13th day of January, 1986, for the reasons set forth in the Memorandum Opinion issued this date,

IT IS ORDERED THAT:

1. Defendants David P. Reynolds' and Reynolds Metals Company's motion to dismiss as to them is granted as to Counts One, Two, Three, Six, and Seven of

plaintiff Patrick H. Diamond's Second Amended Complaint.

2. Defendant David P. Reynolds' motion to dismiss Count Four of plaintiff Patrick H. Diamond's Second Amended Complaint is denied.

3. Defendants David P. Reynolds and Reynolds Metals Company's motion in the alternative for a rule 11 hearing is denied.

(sd.) Murray M. Schwartz
United States District Judge

District Court 7/15/86

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PATRICK H. DIAMOND,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. 84-280
v.	)	MMS
	)	
DAVID P. REYNOLDS, RALPH S. THOMAS, and ROBERTSHAW CONTROLS COMPANY,	)	
	)	
Defendants.	)	

William Prickett, Esq., and Norman Pernick, Esq., of Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, Delaware; Of Counsel: Harold E. Kohn, Esq., William B. Lytton, Esq., and Mary E. Kohart, Esq., of Kohn, Savett, Marion & Graf, P.C., Philadelphia, Pennsylvania; Attorneys for Plaintiff.

Arthur G. Connolly, Jr., Esq., of Connolly, Bove, Lodge & Hutz, Wilmington, Delaware; Of Counsel: Jeffrey Barist, Esq., and Kathryn L. Bedke, of White Case, New York, New York; Attorneys fr Defendant David P. Reynolds.

E. Norman Veasey, Esq., Allen M. Terrell, Jr., and Thomas A. Beck, Esq., of Richards, Layton & Finger, Wilmington, Delaware; Of Counsel: Wachtell, Lipton, Rosen & Katz, New York, New York; Attorneys for Defendants Ralph S. Thomas and Robertshaw Controls Company.

MEMORANDUM OPINION

Dated: July 15, 1986
Wilmington, Delaware

SCHWARTZ, Chief Judge

Plaintiff, Patrick Diamond ("Diamond"), filed a complaint on May 15, 1984 against defendants Robertshaw Controls Company ("Robertshaw"), Ralph S. Thomas ("Thomas"), Reynolds Metals Company ("Reynolds Metals"). and David P. Reynolds ("Reynolds"), on a cause of action arising out of the termination of plaintiff's employment with Robertshaw. All defendants answered. On July 6, 1984, plaintiff filed his first amended complaint, which was also answered by all

defendants. On March 5, 1985, plaintiff filed his second amended complaint, after having obtained leave of the Court.

On March 15, 1985, defendants Robertshaw and Thomas answered the second amended complaint. ON April 1, 1985, defendants Reynolds and Reynolds Metals filed a motion to dismiss the second amended complaint. The Court granted this motion on all but Count Four on January 13, 1986. Because Reynolds Metals was not implicated in Count Four, it has been dismissed entirely from this action and Reynolds remains a party only with respect to Count Four.

Pending are three motions. Plaintiff by motion dated December 20, 1985, seeks leave of the Court under Fed. R. Civ. P. 39(b) to file an untimely demand for a jury trial. Defendants

Thomas and Robertshaw on January 31, 1986 moved for summary judgment. On April 8, 1986 defendant Reynolds moved for summary judgment on Count Four.

FACTS

Diamond in April, 1978 assumed the position of Vice-President, Finance, at Robertshaw. In April, 1980 he became a member of Robertshaw's Board of Directors, Chairman of the Board's Finance Committee, and Chief Financial Officer.

On February 24, 1982 plaintiff entered into a "golden parachute" severance agreement with defendant Robertshaw which provided plaintiff would be entitled to termination compensation if his termination occurred within three

years of a "change of control" at Robertshaw. Second Amended Complaint ¶24. On November 18, 1983, Diamond was terminated as a Robertshaw officer and director, effective that date. See id. Ex. A (Letter from R.S. Thomas to Patrick H. Diamond (Nov. 18, 1983)). On that same date plaintiff executed a Resignation Agreement with Robertshaw.

Defendant Reynolds has been Chairman of the Board of Robertshaw since 1978 and Chairman of the Board and Chief Executive Officer of Reynolds Metals Since 1976. Reynolds Metals as of April, 1978, owned 27 percent of the stock of Robertshaw, id. ¶ 49, and by November, 1980 owned approximately 30%. Id. ¶ 15(b). Reynolds and Reynolds Metals on October 25, 1983 announced the purchase by Reynolds Metals of approximately an

additional ten percent of Robertshaw shares. Id. ¶ 49.

Thomas has been a member of the board of Directors of Reynolds Metals and President and Chief Executive Officer of Robertshaw since 1972. Second Amended Complaint P 4.

This Court has diversity jurisdiction under 28 U.S.C. § 1223. Virginia law applies to the state-law claims. See Diamond v. Reynolds, C.A. 84-280, slip op. at 7 (D. Del. Jan. 13. 1986).

DISCUSSION

A. Plaintiff's Demand for a Jury Trial

Rule 38(b) of the Federal Rules of Civil Procedure states that a demand for a jury trial of any issue triable for right before a jury may be served upon

the other parties "at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue." Failure to comply with this rule constitutes a waiver of the right to trial by jury. Fed. R. Civ. P. 38(d).

Although plaintiff concedes his demand for a jury trial is untimely, Dkt. 97, at 4, he requests the Court in its discretion to grant the motion for a jury trial pursuant to Rule 39(b) of the Federal Rules of Civil Procedure, which provides that "notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

Whether a court should exercise the discretion contemplated by Rule 39(b) in any particular case must be based upon the facts and circumstances of that case. Kalmanovitz v. G. Heileman Brewing Co., 610 F. Supp. 1319, 1328 (D. Del. 1985). In this district, "a jury should not be granted under the discretionary power of the court under Rule 39(b) unless some adequate or proper reason be assigned to invoke such discretionary power." Reeves v. Pennsylvania R.R., 9 F.R.D. 487, 488-89 (D. Del. 1949). "Before the Court should act to relieve a plaintiff from his waiver, highly exceptional circumstances should be set forth." Lemelson v. Gerber Prods. Co., 39 F.R.D. 336, 337 (E.D.N.Y. 1966).

Plaintiff states his demand was untimely because he and his counsel were

under the misapprehension that plaintiff had made a jury demand in the original complaint, and "only recently" realized no demand was ever made. Dkt. 97, at 7. This excuse does not suffice under the rule. "[M]ere inadvertence, oversight or lack of diligence on the part of counsel is not sufficient ground to evoke relief under Rule 39(b)." Kalmanovitz, 610 F. Supp. at 1328 (quoting Biesenkamp v. Atlantic Richfield Co., 70 F.R.D. 365, 366 (E.D. Pa. 1976)). See also Wall v. National R.R. Passenger Corp., 718 F.2d 906, 910 (9th Cir. 1983); Noonan v. Cunard Steamship Co., 375 F.2d 69, 70 (2d Cir. 1967) (collecting cases); 5 J. Morre Federal Practice ¶ 39.09, at 34-30 & n.11 (1985). This is especially true where, as here, experienced trial counsel

are involved. See Kalmanovitz, 610 F. Supp. at 1328.

In determining whether to grant a waiver, a court may also consider the types of factual issues to be decided, Ridge Theatre Corp. v. United Artists Corp., 27 F.R.D. 8, 10 (E.D. Pa. 1961), and the type of case. See S.S. Kresge Co. v. Holland, 158 F.2d 495, 497 (6th Cir. 1946) (approving exercises of Rule 39(b) discretion "since an action for damages for personal injuries is peculiarly one to be decided by a jury). See also Kalmanovitz, 610 F. Supp. at 1329. Plaintiff's cause of action now contains common-law counts only, see infra pp. 6-9 (dismissing RICO counts), and is thus appropriate for jury determination. But see Kalmnaovitz, 610 F. Supp. at 1329 (complex contract action

inappropriate for exercise of Rule 39(b) discretion). However, a mere showing that these issues may appropriately be tried to a jury does not overcome a waiver caused by inadvertence.

Plaintiff also claims he may be prejudiced if the Court sits as the trier of fact, since the Court has expressed "grave doubts" as to plaintiff's ability to prevail on the claim against defendant Reynolds, see Diamond v. Reynolds, C.A. No. 84-280, slip op. at 8 (D. Del. Jan. 13, 1986), and since the Court has been informed by defendants that plaintiff was convicted of filing false income-tax returns. Plaintiff cites no authority as to ground to grant his motion, and I decline to do so. If plaintiff believe I have a personal bias or prejudice against him, his recourse is to file an

appropriate motion and affidavit stating the facts and reasons upon which his belief rests, along with a certificate by counsel stating the affidavit is made in good faith. See 28 U.S.C. § 144.

For the foregoing reasons, plaintiff's motion for a jury trial will be denied.

B. Motion of Defendants Thomas and Robertshaw for Summary Judgment

Under Rule 56(c) of the Federal Rules of Civil Procedure, a court shall render summary judgment if it is "show[n] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The party moving for summary judgment has the burden of showing the absence of a genuine issue as to any material fact. Adickes v. S.H.

Kress & Co., 398 U.S. 144, 157 (1970). Nonetheless, once a motion for summary judgment has been made, the party opposing summary judgment may not rest upon the allegations set forth in the pleading, "coupled with the hope that something can be developed at trial in the way of evidence to support those allegations." First Nat'l v. Cities Serv. Co., 391 U.S. 253, 290 (1968). The adverse party "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "[S]ummary judgment will not lie . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 54 U.S.L.W. 4755, 4757 (U.S. June 25, 1986).

1. RICO Claims (Count One, Two, and Three)

Plaintiff's first three counts allege Thomas violated Sections 1962(b), (c), and (d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq. Defendant Thomas argues he should be granted summary judgment on these three counts because Diamond lacks standing under the doctrine of law of the case. I agree plaintiff lacks standing, but for different reasons.

a. Law of the Case

The law of the case doctrine provides that once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances. Haymam Cash Register Co. v. Sarokin, 669 F.2d 162, 165 (3d Cir. 1982) (citing 1B J. Moore, Federal Practice ¶ .404[1]).

The doctrine is designed to promote finality and efficiency. Hayman Cash Register, 669 F.2d at 165. However, the doctrine may not be invoked where the issue previously litigated differs from the issue presently before the court. Evans v. Buchana, 465 F. Supp. 445, 448-49 (D. Del. 1979).

Whether Thomas violated RICO by discharging plaintiff is not governed by the law of the case because, as framed by plaintiff, the issue differs from that previously decided. Plaintiff alleges defendants made false and misleading statements to shareholders through the mail, thereby gaining control of Robertshaw. Second Amended Complaint ¶¶ 30, 52-66. Plaintiff allegedly was injured by this purportedly unlawful seizure of control when defendants

subsequently discharge him. Id. ¶¶ 58, 62, & 66.

Defendants Reynolds and Reynolds Metals were dismissed from this case because plaintiff failed to show a causal nexus between his discharge and defendants Reynolds' and Reynolds Metals' obtaining "control" over Robertshaw. Diamond v. Reynolds, C.A. No. 84-280, slip op. at 5-6 (D. Del. Jan. 13, 1986). However, plaintiff's argument as to the causal nexus between his discharge and Thomas' behavior does not focus on a theory of "control" over Robertshaw. In fact, Thomas, as the president of Robertshaw at all relevant time periods, was in a position to discharge plaintiff irrespective of who obtained control over Robertshaw. Eschewing a control theory, plaintiff urges Thomas discharged him

because Diamond actively opposed Thomas' alleged racketeering activities, allegedly carried out in conjunction with defendants Reynolds and Reynolds Metals in order to allow Reynolds Metals to gain control of Robertshaw. This difference in theory of recovery directed to Reynolds and Reynolds Metals and that directed to Thomas precludes application of the law of the case doctrine.

b. RICO Injury

In support of his argument that Thomas is liable to him under RICO, plaintiff cites Callan v. State Chemical Manufacturing Co., 584 F. Supp. 619 (E.D. Pa. 1984). The corporate defendant in Callan marketed its products by requiring its sales representatives to bribe those employees of its customers responsible for purchasing its product. Id. at 620.

The plaintiffs, who were hired by the defendant to sell its products, were fired when they refused to carry out this bribery scheme. Id. The district court concluded plaintiffs had standing to bring a RICO claims, because they had been injured by defendant's alleged racketeering activities. Id. 622-23.

Although the factual situation is analogous, Callan is not dispositive because of intervening case law. Sedima, S.P.R.L. v. Imrex Co., 105 S. Ct. 3275 (1985), establishes that a party has standing to sue under RICO only if "injured in [its] business or property by the conduct constituting the violation." Id. at 3285-86. While it appears plaintiff would have had standing under Callan, he does not have standing under Sedima, because he was not

"injured . . . by the conduct constituting the [RICO] violation."

The racketeering acts allegedly committed by Thomas -- mail-fraud violations, see Second Amended Complaint ¶¶ 40-51 -- are the acts that form the basis for plaintiff's allegation RICO was violated. According to plaintiff, he was discharged only because he refused to help carry out these acts. Thomas' discharge of plaintiff was completely severable from any racketeering acts defendants allegedly conducted. The discharge of plaintiff may have assisted defendants' alleged scheme, but the discharge in itself is not conduct constituting a violation of RICO. The persons injured by the alleged racketeering acts of Thomas are the shareholders of Robertshaw. They alone

have standing to bring a RICO action containing the type of allegations made by plaintiff. Plaintiff, however, represents himself only and has never asserted that he is bringing suit on behalf of the shareholders of Robertshaw.

Because he cannot show the requisite injury, plaintiff lacks standing to maintain a RICO action against Thomas. Defendant Thomas' motion for summary judgment on Counts One, Two, and Three of Plaintiff's Second Amended Complaint will be granted.

2. Wrongful-Discharge Claims (Counts Six and Seven)

Counts Six and Seven charge Thomas and Robertshaw with having wrongfully discharged plaintiff in order to punish him for performing his fiduciary duties as an officer and director of Robertshaw.

Second Amended Complaint ¶¶ 74-85. The Court has already held plaintiff is unable to allege his discharge came within the scope of the narrow Virginia exception to the employment-at-will doctrine. Diamond v. Reynolds, C.A. 84-280, slip op. at 11-12 (D. Del. Jan. 13, 1986).

Plaintiff's claim against Thomas and Robertshaw is identical to his claim against Reynolds. Plaintiff acknowledges this, arguing the Court has interpreted too narrowly Bowman v. State Bank, 229 Va. 534, 331 S.E.2d 797 (1985), which recognizes a cause of action for wrongful discharge for an employee who has been discharged for exercising a statutory right. I decline to reverse my previous interpretation. As a consequence, Thomas and Robertshaw will be granted summary

judgment on this claim under the law of the case doctrine.

3. Breach-of-Contract Claims (Counts Five and Eight)

In Count Five of his Second Amended Complaint, plaintiff alleges Robertshaw breached the severance agreement dated February 24, 1982 between plaintiff and Robertshaw by failing to pay plaintiff the termination compensation due under the agreement. Count Eight alleges Robertshaw also breached the November 18, 1983 Resignation Agreement.

a. The Severance Agreement (Count Five)

On February 24, 1982, the Board of Directors of Robertshaw adopted a Severance Agreement for certain of its officers, including plaintiff. The Agreement provided that plaintiff and other Robertshaw officers would be

entitled to a lump-sum payment if they were terminated involuntarily within three years after a change of control at Robertshaw. The Agreement defined "change of control" as follows:

> For the purpose of this agreement, a "change of control" shall include (i) the acquisition of a total of 30% or more of the outstanding shares of the company's common stock by an entity, person or group other than the company pursuant to a tender or exchange offer or otherwise or series of related transactions, or (ii) the election, either directly or indirectly, of more than one third of the company's board of directors by an entity, person or group (except Reynolds Metals Company or a wholly owned subsidiary). Notwithstanding the foregoing, the acquisition of shares of common stock by Reynolds Metals Company, or a wholly owned subsidiary, acting on its behalf shall not constitute a "change of Control." (Emphasis added).

Plaintiff executed the Severance Agreement on February 24, 1982. On

November 15, 1983, plaintiff was terminated.

Defendants urge the Severance Agreement is inapplicable because none of the events defined as a "change of control" occurred before Diamond was terminated (and, indeed, have never occurred). Plaintiff recognizes that under the "change of control" definition Reynolds Metals is not deemed to have acquired control over Robertshaw in the event Reynolds Metals elects more than one-third of the Robertshaw board of Directors or acquires 30% or more of the common stock of Robertshaw. Plaintiff, however, believes the Severance Agreement was triggered because his termination occurred within three years after an alleged change of control over Robertshaw by Reynolds Metals using other means.

Plaintiff contends the Severance states that "a 'change of control' shall include . . . " (emphasis added) certain events. Plaintiff concludes that use of the work "include" "recognizes that these two ways are not the only methods by which a change of control can be achieved."[1]

Plaintiff argues the change of control occurred when Thomas, Reynolds, and Reynolds Metals agreed to operate Robertshaw for the benefit of Reynolds Metals. Specifically, plaintiff alleges a "change of control" came about as a result of several events that took place between February 24, 1982 and November 1, 1983. See Second Amended Complaint ¶ 30. Defendants describe plaintiff's notion of "change of control" as "completely alien

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[1]Dkt. 105, at 14.

to the terms of the Severance Agreement."[2] Moreover, defendants claim the acts cited by plaintiff "are acts of normal managerial discretion."[3] Because there is a disputed question of material fact as to intent, summary judgment is not appropriate on this ground.

Defendants also argue the separate Resignation Agreement plaintiff subsequently executed with Robertshaw acts as an accord and satisfaction which bars any claim based on the Severance Agreement. Like defendants' argument above, defendants' position cannot be a successful basis for summary judgment because there is a material issue of fact.

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[2]Dkt. 100, at 30.

[3]Id. at 31.

"An accord is a contract under which an obligee promises to accept a stated performance in satisfaction of the obligor's existing duty. Performance of the accord discharges the original duty." Restatement (Second) of Contracts § 281(1) (1981). Defendants have presented no evidence that the Resignation Agreement refers in any way to the Severance Agreement or that the parties intended the Resignation Agreement should replace any claims plaintiff may have had under the Severance Agreement. Plaintiff denies the Resignation Agreement has or was intended to have such effect. There is no inherent impossibility in a claim by plaintiff that he is entitled to the benefit of both the Severance Agreement and the Resignation Agreement. At this

procedural stage, one cannot hold as a matter of law that the Resignation Agreement operates as an accord and satisfaction of plaintiff's claims under the Severance Agreement.

There is an additional barrier to a conclusion that the Resignation Agreement operates as a bar to plaintiff's Severance Agreement claims. An obligor's breach of an accord discharges the new duty of the obligee to accept the performance of the accord in satisfaction of the old contract. Restatement (Second) of Contracts § 218(2) (1981). Even assuming the Resignation Agreement is an accord, plaintiff alleges defendants have breached the Resignation Agreement. See infra pp. 15-16. Taking this assertion to be true, the Court is

precluded from holding there has been an accord and satisfaction.

Robertshaw's motion for summary judgment on Count Five will be denied.

b. The Resignation Agreement (Count Eight)

Count Eight of the Second AMended Complaint alleges Robertshaw breached a November 18, 19893 Resignation Agreement by wrongfully terminating payments made under it to plaintiff.

On November 18, 1983, plaintiff signed an agreement with Robertshaw which provided, "[i]n recognition of your past contribution and future loyalty to Robertshaw . . . " plaintiff would continue to receive his regular salary through 1984, plus insurance benefits, secretarial services, use of a company car, vesting of stock options, and

executive placement services. The Resignation Agreement stated:

> As long as your salary continues though, you will not accept employment with a competitor, direct or indirect, of Robertshaw, nor will you compete with Robertshaw, directly or indirectly, as an individual in a partnership or in any other manner. You will not remove or retain any Robertshaw data files and will return any data or files which you may have in your personal possession. You will also clear any travel advances or other indebtedness to the company and submit all outstanding expense reports by November 30.

Robertshaw complied with the terms of the Resignation Agreement from November 18, 1983 until on or about June 1, 1984. Robertshaw alleges it discontinued payments on that date because plaintiff had repeatedly breached the Agreement. Robertshaw states Diamond breached his duty of future loyalty under the agreement by providing to various newspapers copies of his complaint prior to filing this lawsuit. Robertshaw also states Diamond breached the specific terms of the Agreement by removing and retaining numerous Robertshaw files. Dkt. 100, at 33-34.

Plaintiff admits he retained personal copies of documents dating from the period of his employment at Robertshaw. He disputes, however, that these personal copies were

"Robertshaw data or files" which the agreement prohibit him from removing or retaining. Furthermore, even if plaintiff did breach the Agreement by retaining these papers, plaintiff argues the breach was not material so as to warrant Robertshaw's refusal to perform its duties under the Agreement.

A party to a contract is not required to perform duties remaining under the contract if there has been an uncured, material breach of the contract by the other party. Restatement (Second) of Contracts § 237 (1981). Whether a breach is material is determined by examining several factors:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately

> compensated for the part of that benefit of which he will be deprived;
>
> (c) the extent to which the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Id. § 241.

Because the materiality of a breach is a question of fact, not of law, Canada Dry Corp. v. Nehi Beverage Co., 723 F.2d 512, 517 (7th Cir. 1983); Hensley v. E.R. Carpenter Co., 633 F.2d 1106, 1110 (5th Cir. 1980); J. Calamari & J. Perillo, The Law of Contracts 409 (1977); E. Farnsworth, Contracts § 8.16

(1982); 17A C.J.S. Contracts § 630(a) (1963), it is inappropriate for decision on a motion for summary judgment.

Robertshaw's motion for summary judgment on County Eight of the Second Amended Complaint will be denied.

3. Defendant Reynolds' Motion For Summary Judgment

Defendant Reynolds moves for summary judgment on County Four, which alleges he tortiously interfered with a prospective contractual relationship involving plaintiff's severance agreement. This Court has previously denied Reynolds' motion to dismiss Count Four, on the ground plaintiff's claim appeared to fit within the outer perimeters of the tort. Diamond v. Reynolds, C.A. 84-280, slip op. at 9 (D. Del. Jan. 13, 19860. Defendant asserts summary judgment is now

appropriate because plaintiff can present no evidence to support his allegations.

Under Virginia law, intentional interference with a prospective contract is tortious if it "91) induce[s] or otherwise cause[s] a third party not to enter into a prospective contract with the plaintiff, or (2) prevent[s] the plaintiff from entering into a contract." Allen Realty Corp. v. Holbert, 227 Va. 441, 318 S.E.2d 592, 597 (1984) (citing Annot., 6 A.L.R. 4th 195, 201 (1981)).

Plaintiff claims Reynolds caused Robertshaw to insert into the Severance Agreement a provision excluding actions by Reynolds Metals from the definition of

"change of control."[4] Plaintiff claims that if not for Reynolds' action Robertshaw would have entered into a contract with plaintiff which did not contain the "Reynolds Exclusion" that was included in the final Agreement.

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[4]The so-called "Reynolds Exclusion" is included with the "change of control" section of the Severance Agreement. For convenience, the definition is reproduced here with the "Reynolds Exclusion" italicized.

> For the purpose of this agreement, a "change of control" shall include (i) the acquisition of a total of 30% or more of the outstanding shares of the company's common stock by an entity, person or group other than the company pursuant to a tender or exchange offer or otherwise or series of related transactions, or (ii) the election, either directly or indirectly, of more than one third of the company's board of directors by an entity, person or group (*except Reynolds Metals Company or a wholly owned subsidiary*). *Notwithstanding the foregoing, the acquisition of shares of common stock by Reynolds Metals Company, or a wholly owned subsidiary, acting on behalf shall not constitute a "Change of Control."* (parentheses in original.)

Reynolds, on the other hand, avers the "Reynolds Exclusion" was not the result of anything done by him.

Plaintiff alleges, and Reynolds does not contest, that Robertshaw's outside counsel, Martin Lipton, originated the suggestion that Robertshaw enter into severance agreements with certain of its officers and directors. Second Amended Complaint ¶ 17. Thomas, the president of Robertshaw, asked Joseph Howell, Jr. to prepare a draft severance agreement. R.S. Thomas Dep. 83 (April 23, 1985), reproduce in Dkt. 105, Ex. B.

Plaintiff states "drafts of a proposed severance agreement which was circulated around June, 1981 did not mention Reynolds Metals." Dkt. 105, at 8. Howell, who prepared the first draft of the severance agreement for Robertshaw,

testified that he received from Lipton's firm a form agreement that had not reference to Reynolds Metals. J.A. Howell, Jr. Dep. 83 (April 24, 1985), reproduced in Dkt. 105, Ex. C. However, Howell "marked . . . up" the form so that it included a reference to Reynolds Metals, id. at 84, and testified that all drafts prepared by Robertshaw contained a reference to Reynolds Metals. Id. at 83. Howell stated that "[f]rom the inception of the drafting process" he recognized that Reynolds Metals was a major shareholder of Robertshaw. Id. at 88.

Plaintiff admits that between June, 1981 and January, 1982, several proposed drafts circulated, all of which included a percentage test which would be applied n determining when a Reynolds Metal takeover of Robertshaw had occurred.

Dkt. 105, at 8-9. Citing the testimony of Howell, plaintiff states that the final proposed draft of the Severance Agreement contained o mention of Reynolds Metals. Dkt. 105, at 9 (citing J.A. Howell Dep. at 86, reproduced in Dkt. 105, Ex. C). This is a misreading of the Howell deposition, however. Howell was asked at this deposition whether the draft circulated at a joint meeting of the Executive Committee and the Stock Option Committee in February, 1982, "included what has been referred to and defined in the Complaint as the Reynolds exclusion?" J.A. Howell Dep. at 86, reproduce in Dkt. 105, Ex. C. Howell stated it did not. J.A. Howell Dep. at 86, 88-89, reproduced in Dkt. 107, Ex. A. Rather, that draft defined change of control as of 30% for all parties other

than Reynolds Metals, and in excess of 50% for Reynolds Metals. Id. at 88.[5]

Upon seeing the draft at the February, 1982 meeting, Reynolds and the two other Reynolds Metals' directors indicated they needed more time to study it. Id. at 88-89. Reynolds stated "the 50 percent applicable to [RMC] might not be appropriate." Id. at 90.

Plaintiff states that at this meeting Reynolds, for the first time, demanded the Severance Agreement include the Reynolds Exclusion. Dkt. 105, at 9. In support of his assertion plaintiff recounts in his deposition what he was told occurred at that meeting. P.H. Diamond Dep. at 122-29, reproduced in

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[5]Howell had previously rejected Diamond's suggestion that the Reynolds Metals' percentage be reduced to 45%. J.A. Howell Dep. at 88.

Dkt. 105, Ex. A. Reynolds denies making any such demand.

Whether this alleged conduct by Reynolds -- which forms the heart of plaintiff's tort claim -- occurred is thus in sharp dispute. It is also immaterial, for plaintiff has failed to show this dispute creates a genuine issue as to a material fact. "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment."
Anderson v. Liberty Lobby, Inc., 54 U.S.L.W. 4755, 4757 (U.S. June 25, 1986) (emphasis in original).

On a motion for summary judgment a nonmoving party is required to make a sufficient showing on an essential element of his case with respect to which

he has the burden of proof at trial in order to avoid judgment being entered against him. Celotex Corp. v. Catrett, 54 U.S.L.W. 4775, 4777 (U.S. June 25, 1986.) For plaintiff ultimately to prevail at trial, it would be necessary for him to show there was a particular contract that would have been entered into but for the alleged tortious interference. See supra p. 17 (outlining elements of tort). Even if Reynolds demanded insertion of the "Reynolds Exclusion" into the draft Severance Agreement circulated at the February, 1982 meeting, plaintiff has presented no

evidence that that particular draft[6] -- or any other draft -- would have been approved.

Because plaintiff has not established that some particular contract with terms more favorable to him would have been entered into, plaintiff can show o injury. Thus, plaintiff cannot prevail on this claim. Defendant Reynolds' motion for summary judgment on Court Four of the Second Amended Complaint will therefore be granted.

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[6]Plaintiff's argument suffers an additional defect. If the Board had adopted a Severance Agreement with a 505 figure, the Agreement would not have come into operation on plaintiff's behalf because Reynolds Metals has never owned 505 of the common stock of Robertshaw. As of March 31, 1982, Reynolds Metals owned 30.17% of Robertshaw. Reply Memorandum of David P. Reynolds, Dkt. 107, at 8. As of September 30, 1983 -- approximately six weeks before plaintiff was terminated -- Reynolds Metals owned 30.03%. Id. As of September 30, 1985 it owned 41.20%. Id.

CONCLUSION

Plaintiff's motion for a jury trial will be denied as untimely. Defendant Thomas' motion for summary judgment on Counts One, Two, and Three of the Second Amended Complaint will be granted. Defendants Thomas and Robertshaw's motion for summary judgment on Counts Six and Seven of the Second Amended Complaint will be granted. Defendant Reynolds' motion for summary judgment on Count Four of the Second AMended Complaint will be granted. Defendant Robertshaw's motion for summary judgment on Counts Five and Eight of the Second Amended Complaint will be denied.

Thus, Robertshaw is the only defendant remaining in the case, and then

only on the breach of contract claim. An order will be entered in accordance with this opinion.

District Court 7/15/86

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

PATRICK H. DIAMOND,	)	
	)	
Plaintiff,	)	Civil Action
	)	No. 84-280
v.	)	MMS
	)	
DAVID P. REYNOLDS, RALPH S. THOMAS, and ROBERTSHAW CONTROLS COMPANY,	)	
	)	
Defendants.	)	

ORDER

At Wilmington this 15th day of July, 1986, for the reasons set forth in the Memorandum Opinion issued that date,

IT IS ORDERED THAT:

1. Plaintiff's motion for a jury trial is denied as untimely.

2. Defendant Thomas' motion for summary judgment on Counts One, Two, and Three of the Second Amended Complaint is granted.

3. Defendants Thomas and Robertshaw's motion for summary judgment on Counts Six and Seven of the Second Amended Complaint is granted.

4. Defendant Reynolds' motion for summary judgment on Count Four of the Second Amended Complaint is granted.

5. Defendant Robertshaw's motion for summary judgment on Counts Five and Eight of the Second Amended Complaint is denied.

sd: Murray M. Schwartz
United States District Judge

APPENDIX C

COMPLAINT

Diamond v. Reynolds

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

PATRICK H. DIAMOND,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 84-280
DAVID P. REYNOLDS, REYNOLDS METALS COMPANY, RALPH S. THOMAS, and ROBERTSHAW CONTROLS COMPANY,	)	MMS
	)	
Defendants,	)	

SECOND AMENDED COMPLAINT

The Parties

1. Plaintiff Patrick H. Diamond is a citizen and resident of New York. In April, 1978, he became an employee of defendant Robertshaw Controls Company and held the position of Vice President, Finance. In April, 1980, he became a member of the Board of Directors of Robertshaw Controls Company, Chairman of the Finance Committee of the Board and

Chief Financial Officer. On November 15, 1983, he was wrongfully terminated as an officer and director of Robertshaw Controls Company, effective November 18, 1983.

2. Defendant David P. Reynolds is Chairman of the Board and Chief Executive Officer of Reynolds Metals Company and has held that position since 1976. He is also Chairman of the Board of Robertshaw Controls Company and has held that position since 1978. He is a citizen of Virginia.

3. At all times relevant to this Complaint, defendant Reynolds Metals Company ("Reynolds Metals") was and is a corporation incorporated under the laws of the State of Delaware whose stock was and is registered pursuant to §12 of the Securities and Exchange Act of 1934, 15 U.S.C. §78l. Its principal place of

business was and is at 6601 Broad Street Road, Richmond, Virginia. As of April, 1978, Reynolds Metals Company owned 27 percent of the stock of Robertshaw Controls Company.

4. Ralph S. Thomas has been a member of the Board of Directors of Reynolds Metals Company and President and Chief Executive Officer of Robertshaw Controls Company since 1972. He is a citizen of Virginia.

5. At all times relevant to this complaint, defendant Robertshaw Controls Company ("Robertshaw") was and is a corporation incorporated under the laws of the State of Delaware whose stock was and is registered pursuant to §12 of the Securities and Exchange Act of 1934, 15 U.S.C. §78l. Its principal place of business was and is at 1701 Byrd Avenue, Richmond, Virginia.

Jurisdiction and Venue

6. This Court has jurisdiction of this case and over all defendants named herein, pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1964(c), 28 U.S.C. §1331, 1332 and the doctrine of pendent jurisdiction. Venue is proper in this District pursuant to 18 U.S.C. §1965 and 28 U.S.C. §1391.

7. Certain defendants are found in this district or have an agent in this district or have transacted their affairs within this district. The ends of justice require that this action proceed in this district against all defendants.

8. The amount in controversy under each count of the complaint, exclusive of interest and costs, exceeds $10,000.00.

General Allegations

9. David Reynolds and Ralph Thomas, as officers and directors of Robertshaw, owed to all the shareholders of Robertshaw a fiduciary duty, including a duty of loyalty, care, candor and faithful service.

10. In violation of their fiduciary duty to all the shareholders of Robertshaw, David Reynolds and Ralph Thomas devised and acted to implement a plan for David Reynolds, Reynolds Metals and Ralph Thomas to acquire and maintain an interest in and control of Robertshaw.

11. The defendants' plan was as follows:

a) David Reynolds would cause Reynolds Metals Gradually to increase the percentage of outstanding shares of Robertshaw it owned;

b) Reynolds Metals would purchase the Robertshaw stock at the lowest possible price and without paying a premium over market price to other Robertshaw shareholders;

c) Ralph Thomas and David Reynolds would cause Robertshaw to discourage and prevent the acquisition of Robertshaw by any company other than Reynolds Metals;

d) Once Reynolds Metals owned 50% of the outstanding shares of Robertshaw, it would act to eliminate all other Robertshaw shareholders;

e) The defendants would act to deceive, mislead, lull and conceal the plan from the public shareholders of Robertshaw, through the use of the mails and otherwise;

f) The defendants would act to prevent and punish any officer or

director of Robertshaw who might interfere with or object to the plan.

12. The Defendants used the following methods and means to achieve their objectives:

A) The defendants acted to lull the Robertshaw Shareholders into thinking that the Robertshaw management and Directors were informed and able to protect the interests of all the shareholders, including:

i. The preparation and mailing by defendants of Robertshaw's proxy statements for 1982, 1983 and 1984 which said that there were in place severance agreements with officers to "assure continuous dedication to their duties to the Company and stockholders notwithstanding the occurrence of a tender offer or takeover bid. Under these agreements termination

compensation will be paid when the officer's employment is involuntarily terminated or terminated for a reason defined as Good Reason after a Change of Control (as defined) ..."

ii. The preparation and mailing by defendants of a press release of April 1984, which implied that Diamond had voluntarily left the Robertshaw Board.

B) The defendants acted to conceal the power and control of David Reynolds and Reynolds Metals over Robertshaw, including:

i. The preparation and mailing by defendants of Robertshaw's proxy statements of March 1982, 1983 and 1984, which indicated there was a functioning nominating committee, but concealed the fact that David Reynolds determined who should serve and

continue to serve on the Robertshaw board and used that power and control to promote the interests of himself and Reynolds Metals;

ii. The preparation and mailing by defendants of the above referenced Robertshaw proxy statements which concealed the extraordinary powers and plans of the executive committee, in which David Reynolds and Ralph S. Thomas constituted a majority and a quorum.

iii. The concealment by the defendants of the fact that even the "Chief Executive Officer" of Robertshaw could not place an item on the agenda for consideration by the Robertshaw Board of Directors without the prior approval of David Reynolds;

iv. The preparation and mailing by defendants of the Reynolds

Metals' proxy statement of March 8, 1984 which stated that "the company does not deem itself to exercise control of Robertshaw Controls Company under Securities and Exchange Commission Rules and Regulations."

C) Despite the fact that the Robertshaw Board of Directors had neither considered whether nor determined that the takeover of Robertshaw by Reynolds Metals was in the best interests of Robertshaw and all of its shareholders, the defendants actively discouraged companies who might make an offer to the shareholders of Robertshaw in competition with Reynolds Metals' plan to acquire an additional interest in and acquire and maintain control of Robertshaw, including:

i. The preparation and mailing by defendants of press releases in

January, 1982, in which the defendants stated that there were no discussions concerning or interest in Robertshaw's being acquired by or being merged with another company. This was at a time when David Reynolds and Ralph S. Thomas, directors of Robertshaw, knew that Reynolds Metals had a plan to acquire the Robertshaw stock held by other shareholders;

ii. Actions undertaken by David Reynolds and Ralph Thomas to prevent the acquisition of Robertshaw stock by other companies;

iii. Ralph Thomas' refusal to take any action to prevent the acquisition of additional Robertshaw stock by Reynolds Metals;

iv. Ralph Thomas' refusal to seek out companies which might be interested in acquiring Robertshaw

stock and control of Robertshaw on terms more favorable to the public shareholders than those planned by Reynolds Metals.

D) In seeking to facilitate the take over of Robertshaw by Reynolds Metals at the lowest possible cost to Reynolds Metals, the defendants violated the fiduciary duty they owed to all the shareholders of Robertshaw of loyal and faithful service in that the value of the Robertshaw stock owned by the non-Reynolds Metals shareholders was reduced as a result of the defendants' action.

E) The defendants caused the firing of Patrick H. Diamond to punish him for his opposition to the plan of the defendants, to eliminate opposition by the officers and directors of Robertshaw to that plan, to intimidate and prevent

other Robertshaw officers and directors from opposing the defendants' plan, and Diamond's firing was a result of their violations of Title 18, United States Code, Section 1962.

Pursuit of Robertshaw
As A Takeover Target

13. During 1978 and thereafter, Robertshaw was an attractive candidate for acquisition by other companies and various companies took actions which indicated their interest in their possible takeover of Robertshaw:

a) In June, 1978, Ralph S. Thomas told the Robertshaw Corporate Staff that David Reynolds had informed Thomas that Raytheon Company wanted to offer $45 per share for the 27% interest of Robertshaw which Reynolds Metals then owned. This price was at a premium of about ninety percent over

the then market price of $23 3/4 per share;

b) On or about September 25, 1980, Gulf & Western Industries, bought 10.4 percent of Robertshaw's stock in the open market and filed a Form 13-D with the Securities and Exchange Commission ("SEC");

c) In July, 1981, two British firms, General Electric (U.K.) and Smiths Industries expressed interest in acquiring Robertshaw;

d) During the Summer and Fall of 1981, Delaware North (and its subsidiary Solar Sportsystem) bought 2.8% of Robertshaw's stock;

e) During the Summer and Fall of 1981, Tyco Labs bought 4.8% of Robertshaw's stock;

f) In January, 1982, Ametek, Inc. acquired the Delaware North (and

Solar Sportsystem) block of Robertshaw stock and the Tyco block of Robertshaw stock and filed a Form 13-D with the SEC stating that it owned 9.9% of Robertshaw's stock;

g) In June, 1983, Raytheon Company was identified by Robertshaw's investment bankers as a company which might be interested in acquiring Robertshaw stock and control of Robertshaw on terms favorable to Robertshaw's shareholder.

Robertshaw's Defensive Moves To Prevent A Takeover By Any Company Other Than Reynolds Metals

14. During 1981 and 1982, Reynolds Metals was in a financial condition which did not allow it to challenge and compete with other companies who had an interest in acquiring control of Robertshaw:

a) In 1981, Reynolds Metals' profits fell 52%;

b) From July 1, 1982 to July 1, 1983 Reynolds Metals lost an aggregate of approximately $110 million;

c) In May, 1982, Reynolds cut its dividend to 45 cents per share from 60 cents per share, and in November, 1982, Reynolds cut its dividend to 25 cents per share.

15. During the period of time that Reynolds Metals was unable to challenge and compete with other companies who had an interest in acquiring control of Robertshaw, the defendants acted to prevent the takeover of Robertshaw by companies other than Reynolds Metals:

a) Raytheon's interest in purchasing Reynolds Metals' block of Robertshaw stock was rebuffed by David Reynolds and Ralph Thomas;

b) In November, 1980, Ralph Thomas caused Robertshaw to threaten to commence legal proceedings against Gulf & Western Industries which had bought a 10.4 percent interest in Robertshaw. As a result, Gulf & Western sold these shares back to Robertshaw. As a result, Gulf & Western sold these shares back to Robertshaw. This purchase by Robertshaw of its own stock decreased the number of outstanding shares of Robertshaw stock, and had the effect of increasing the percentage of Robertshaw stock owned by Reynolds Metals to approximately 30%;

c) In January 1982, Thomas caused legal proceedings to be commenced by Robertshaw to force Ametek, Inc. to divest itself of all Robertshaw shares it owned and to prevent Ametek, Inc. from acquiring any

further interest in Robertshaw. In March, 1982, Robertshaw and Ametek, Inc. entered into a standstill agreement which limited the ability of Ametek, Inc. to purchase Robertshaw stock for two years;

d) On January 15, 1982, Robertshaw issued a press release in which Ralph Thomas said that Robertshaw "has no interest in the sale or merger of the company. We have an exciting future and intend to chart an independent course," and in which David Reynolds said that Reynolds Metals had no interest in selling its 30% holding in Robertshaw and "if required would take whatever steps necessary to protect its investment." These statements were republished by the defendants on January 26, 1982, were widely quoted in newspaper articles and

brokerage reports and were intended to discourage other companies from offering to buy stock from Robertshaw shareholders.

16. As early as 1971, Robertshaw's General Counsel provided information to the members of Robertshaw's Board of Directors concerning their duties in respect to takeover efforts by other companies.

17. In April, 1981, the Robertshaw Board of Directors was advised by outside counsel that severance agreements be entered into with officers and directors of Robertshaw before any tender offer occurred. It was intended that these severance agreements would assure the independent judgments of management as to what would be in the best interests of Robertshaw and its shareholders.

The Reynolds Exclusion

18. In June, 1982, in response to Robertshaw's outside counsel's recommendation concerning severance agreements, a meeting of Robertshaw's Executive Compensation Committee was scheduled to discuss such severance agreements. Though he was not a member of that Committee, David Reynolds ordered Ralph Thomas to cancel the meeting.

19. By February 9, 1982, the Executive Compensation Committee of Robertshaw Controls Company had determined that severance agreements should be entered into with certain key officers of Robertshaw, providing for payments to those officers in the event that their employment should be terminated after the takeover of Robertshaw by any company.

20. The Executive Compensation Committee said that the severance agreements were intended to insure that Robertshaw and its shareholders would receive the officers' and directors' continuing dedication to their duties to the company notwithstanding the occurrence of an unsolicited tender offer or a takeover bid. The committee believed that, in the event the company received proposals from third parties with respect to its future, it would be particularly important that the principal officers of the company be able, without being influenced by the uncertainties of their own situations, to assess and advise the board that such proposals would be in the best interest of the company and its shareholders, and to take such other action regarding such

proposals as the board might determine to be appropriate.

21. The Executive Compensation Committee determined that such severance agreements should provide, among other things, that in the event of a change of control of Robertshaw Controls Company resulting from a tender offer, merger, consolidation, sale of assets or a contested election or from any combination thereof, and an officer's termination of employment within three years after such change of control, a lump sum termination payment would be made equal to five times the officer's highest remuneration (including bonuses, fees, and fringe benefits) paid or payable to the officer during any one of the three calendar years ending with the year in which the officer's employment terminated.

22. On or about February 9, 1982, David Reynolds demanded that an exclusion clause be inserted into the severance agreements, making the severance agreements inapplicable to certain actions by Reynolds Metals Company (hereafter the "Reynolds Exclusion").

23. The Robertshaw Board of Directors acceded to Reynolds' demand and incorporated into the severance agreements the Reynolds Exclusion.

24. Compelled and coerced by the defendants, on February 24, 1982, defendant Robertshaw entered into separate but identical severance agreements, including the Reynolds Exclusion, with plaintiff Patrick H. Diamond and with other officers and directors of Robertshaw that provided that the plaintiff and other officers and directors would be entitled to

termination compensation if their termination occurred within three years after a change of control of the defendant Robertshaw Controls Company.

25. The final form of the severance agreement included the Reynolds Exclusion demanded by David Reynolds. It defined "change of control":

> For the purpose of this agreement, a "change of control" shall include (i) the acquisition of a total of 30% or more of the outstanding shares of the company's common stock by an entity, person or group other than the company pursuant to a tender or exchange offer or otherwise or series of related transactions, or (ii) the election, either directly or indirectly, of more than one third of the company's board of directors by an entity, person or group (except

Reynolds Metals Company, or a wholly owned subsidiary). Notwithstanding the foregoing, the acquisition of shares of common stock by Reynolds Metals Company, or a wholly owned subsidiary, acting on its behalf shall not constitute a "Change of Control."

(Emphasis Supplied.)

26. By including the Reynolds Exclusion in the severance agreements, the defendants attempted to intimidate the officers and directors of Robertshaw from opposing the acquisition of shares of Robertshaw by Reynolds Metals.

Defendants' Actions to Facilitate The Acquisition and Control of Robertshaw By Reynolds Metals

27. By at least June, 1982, David Reynolds had devised a plan to violate his fiduciary duty to all the shareholders of Robertshaw by having

Reynolds Metals buy Robertshaw stock, raising its ownership to 50% of the outstanding Robertshaw stock,and then, when the price of Reynolds Metals stock was higher relative to the price of Reynolds Metals stock, Reynolds Metals would act to eliminate all other Robertshaw shareholders.

28. To facilitate and accomplish this plan, the defendants acted to insure that David Reynolds exercised control over the affairs of Robertshaw:

a) David Reynolds controlled who would serve on the Board of Directors of Robertshaw;

b) David Reynolds controlled the Executive Committee of Robertshaw's Board of Directors. This was a three person committee, of whom two of the members were David Reynolds and Ralph Thomas;

c) In February, 1982, Ralph Thomas instructed Diamond never again to discuss with other members of the Robertshaw Board of Directors any information about takeover techniques without Thomas' prior approval.

29. On April 13, 1983, David Reynolds presided at the Annual Shareholders Meeting of Robertshaw. He opened the meeting to questions from the floor and was asked about what plans Reynolds Metals had for its investment in Robertshaw. He refused to answer. The official minutes recorded that there were no questions at the meeting.

Change of Control of Robertshaw

30. A "change of control" of Robertshaw Company occurred:

a) On February 24, 1982, when defendants caused the Reynolds

Exclusion to be included in the severance agreements;

b) On and after April 13, 1983, when David Reynolds refused to answer a question at the Annual Shareholders Meeting of Robertshaw about Reynolds Metals' plans for investment in Robertshaw, and thereafter caused the official minutes of that meeting to reflect that no questions were asked at the meeting;

c) In July, 1983, when, as a result of Ralph Thomas having asked David Reynolds what Reynolds Metals planned to do concerning the block of Robertshaw stock owned by Ametek, and David Reynolds having told Ralph Thomas that within three to six months Reynolds Metals would be in a stronger financial position, Ralph Thomas refused to enter into discussions with

any of the more than 20 other companies identified by Robertshaw's Investment Bankers as companies that might be interested in purchasing Robertshaw stock on terms favorable to Robertshaw's public shareholders;

d) In August, 1983, when David Reynolds refused to allow discussion at a Robertshaw Board of Directors meeting of a proposal to regulate nominations for the Board of Directors from the floor at annual shareholders meetings;

e) In September, 1983, when defendant David Reynolds prohibited Ralph Thomas, the Chief Executive Officer of Robertshaw Controls Company, from putting any item on the agenda for any future meeting of the Board of Directors of Robertshaw, and ordered that no mailings of any such proposed agenda be made to the members of the

Board of Directors of Robertshaw, without the prior approval of defendant David Reynolds;

f) After September, 1983, when Ralph Thomas refused to put on the agenda of the Board of Directors meetings an item concerning a fair price amendment to the By-Laws which would require that all shareholders receive the same price per share in any acquisition because of his concern over David Reynolds' reaction to a discussion of such an item;

g) In September, 1983, when Ralph Thomas refused to ask the Robertshaw Board of Directors to modify the severance agreements by removing the Reynolds exclusion because of Thomas' fear of being fired by David Reynolds;

h) In or about October, 1983, when Ralph Thomas failed to inform the Robertshaw Board of Directors that Reynolds Metals had authorized approximately $20 million for the purchase of the Robertshaw block of stock then owned by Ametek, Inc.;

i) In October, 1983, when, after Reynolds Metals purchased the Robertshaw block of stock owned by Ametek, thus raising Reynolds Metals ownership to approximately 40% of Robertshaw's stock, Ralph Thomas refused to take action to insure that the interests of the other Robertshaw shareholders would be protected;

j) When Ralph Thomas initiated no action to block the purchase by Reynolds Metals of additional shares of Robertshaw stock;

k) On or about November 1, 1983, when the Reynolds Metals Corporate Secretary notified Robertshaw's Corporate Secretary that Reynolds Metals was putting two more of its full time employees on the Robertshaw Board of Directors.

The Scheme To Defraud Robertshaw's Shareholders

31. The defendants devised a scheme to defraud the shareholders of Robertshaw, other than Reynolds Metals, of their right to the loyal and faithful services of the officers and directors of Robertshaw:

a) It was a part of this scheme to defraud that David Reynolds would and did devise a plan for Reynolds Metals to acquire Robertshaw stock and control of Robertshaw without having to pay a premium for the purchase of the additional shares;

b) It was further a part of this scheme to defraud that David Reynolds and Ralph Thomas would and did act to prevent the takeover of Robertshaw by any company other than Reynolds Metals, even though a takeover by another company would result in the payment of a premium to the Robertshaw shareholders;

c) It was further a part of this scheme to defraud that David Reynolds and Ralph Thomas would and did violate their fiduciary duty to the shareholders of Robertshaw, which included a duty of loyalty, care, candor and faithful service;

d) It was further a part of this scheme to defraud that David Reynolds and Ralph Thomas would and did prevent any employee or director of Robertshaw from acting in a manner

which was inconsistent with or which threatened the success of the scheme to defraud;

e) It was further a part of this scheme to defraud that Ralph Thomas fired Patrick H. Diamond in order to facilitate the scheme to defraud;

f) In furtherance of and for the purpose of executing and attempting to execute the scheme to defraud, the defendants caused the mailing of various items.

Mailings in Furtherance of The Scheme To Defraud Robertshaw's Shareholders

32. On or about March 9, 1982, David Reynolds and Ralph Thomas caused to be mailed and delivered a proxy statement to the stockholders of Robertshaw Controls Company which contained the following language at page 9:

> The Company has entered into severance agreements with Messrs. Thomas, Hansen, Howell, Dennis and four other officers (including one director) to assure continuous dedication to their duties to the company and stockholders notwithstanding the occurrence of a tender offer or takeover bid. Under these agreements, termination compensation will be paid when the officer's employment is involuntarily terminated or terminated for a reason defined as Good Reason after a Change of Control (as defined). Payment will be made if the officer's employment terminates within three years after a change of control and will amount to five times the highest annual remuneration paid during any of the three years ending within the year of termination.

33. On or about March 8, 1983, David Reynolds and Ralph Thomas caused to be mailed and delivered a proxy statement to the stockholders of Robertshaw which reiterated the identical language contained in the 1982 proxy statement describing the severance agreements, as referenced above in paragraph 32.

34. The March 9, 1982 and March 8, 1983 proxy statements of Robertshaw

Controls Company were false and misleading in that they failed fully to describe the severance agreements offered to Robertshaw's directors and officers. Specifically, the proxy statements failed to disclose the Reynolds Exclusion. Their failure to disclose this fact was material and was designed to and had the effect of deceiving and misleading the stockholders into believing that the officers and directors of Robertshaw would exercise independent judgment consistent with their fiduciary duties with respect to all possible changes of control when, in fact, this was false, particularly as to control by Reynolds Metals Company.

35. The mailing of the false and misleading proxy statements was intended to further defendants' scheme to defraud the shareholders of the loyal and

faithful services of their officers and directors, to deceive the shareholders as to the actual control that defendants had over Robertshaw and which they were using for the exclusive benefit of Reynolds Metals, and to facilitate the acquisition of stock of Robertshaw Controls Company by Reynolds Metals, all in violation of 18 U.S.C. §1341.

36. On March 6, 1984, David P. Reynolds and Ralph S. Thomas caused to be mailed and delivered a proxy statement to the stockholders of Robertshaw. Despite the fact that Patrick H. Diamond had been terminated in an attempt to silence any takeover opposition on the Robertshaw board, and despite the fact that the Reynolds Exclusion had been used to deny Diamond the benefits due to him under the severance agreements, the proxy statement again falsely and misleadingly described

the contents of the severance agreements. The failure accurately and fully to describe the severance agreement and the Reynolds Exclusion was a material misrepresentation designed t deceive and mislead the stockholders of Robertshaw Controls Company concerning the control that David P. Reynolds and Reynolds Metals had over the conduct of Robertshaw, to defraud them of the loyal and faithful services of Robertshaw's officers and directors, and to facilitate the acquisition of stock of Robertshaw Controls Company by Reynolds Metals Company, all in violation of 18 U.S.C. §1341.

37. Also on March 6, 1984, David P. Reynolds, Reynolds Metals Company and Ralph S. Thomas caused to be mailed and delivered a proxy statement of Reynolds Metals Company which stated therein that

Reynolds Metals Company "does not deem itself to exercise control of Robertshaw Controls Company under Securities and Exchange Commission Rules and Regulations."

38. This statement was false and misleading. It concealed the material fact that Reynolds Metals did control Robertshaw. This statement was designed to deceive the public, including many shareholders of Robertshaw who would receive it either as members of the public in general or because they, like many Robertshaw shareholders, were also shareholders of Reynolds Metals, into believing that the officers and directors of Robertshaw were able faithfully to exercise independent judgment consistent with their fiduciary duties for the benefit of all of the Robertshaw shareholders. It was also designed to

deceive the Robertshaw shareholders as to the actual control that defendants had over Robertshaw, which control they were using for the benefit of Reynolds Metals and to facilitate the acquisition of stock of Robertshaw Controls Company by Reynolds Metals, all in violation of 18 U.S.C. §1341.

39. At some time between June 1978 and November 15, 1983, when Diamond was fired, Reynolds Metals came into control of Robertshaw. Robertshaw proxies were mailed to shareholders of Robertshaw in March of 1979, 1980, 1981, 1982, 1983 and 1984. In the March following the date when Reynolds Metals came into control of Robertshaw, David Reynolds and Ralph Thomas caused Robertshaw proxies to be mailed which proxies failed to disclose and concealed the material fact that

Reynolds Metals had come into control during the preceeding year.

40. The failure to disclose this fact in the next proxy statement after Reynolds Metals came into control ofRobertshaw was material and was designed to deceive and mislead the stockholders into believing that the officers and directors of Robertshaw would exercise independent judgment consistent with their fiduciary duties with respect to all possible changes of control when in fact this was false, particularly as to control by Reynolds Metals. The mailing of the proxy omitting this notification was intended to further defendants' scheme to defraud the shareholders of the loyal and faithful services of their officers and directors, to deceive the shareholders as to the actual control that Reynolds

Metals had over Robertshaw which it was using for the benefit of Reynolds Metals, and to facilitate the acquisition of stock of Robertshaw Controls Company by Reynolds Metals, all in violation of 18 U.S.C. §1341.

41. The proxy statements of Robertshaw mailed on March 9, 1982, March 8, 1983 and March 6, 1984 also concealed the existence, powers, and duties of the Executive Committee of the Robertshaw board of directors in that: a) The Committee was composed of only three members, including David Reynolds, Chairman; and Ralph Thomas, both directors of Reynolds Metals;

b) It was empowered to exercise the powers of the whole board to the maximum extent allowed by Delaware Law;

c) It could exercise these

powers by majority vote of its three members.

d) Ralph Thomas had announced his plan to bypass and disenfranchise any director who might be elected as a result of cumulative voting by any minority shareholders by causing the business of Robertshaw to be conducted, in such an event, through the Executive Committee rather than through the whole board.

42. The failure to disclose these material facts was designed to deceive and mislead the shareholders of Robertshaw Controls Company concerning the control that David Reynolds and Reynolds Metals had over the conduct of the affairs of Robertshaw, to defraud them of the loyal and faithful services of Robertshaw's officers and directors, and to facilitate the acquisition of stock of Robertshaw Controls Company by

Reynolds Metals Company, all in violation of 18 U.S.C. §1341.

43. On March 9, 1982, on March 8, 1983 and on March 6, 1984, David Reynolds and Ralph Thomas caused to be mailed and delivered proxy statements to the shareholders of Robertshaw which were false and misleading in that they stated that Robertshaw had a Nominating Committee whose primary function "is to recommend to the Board of Directors persons to be considered for election to the Board."

44. This statement was false and misleading in that it failed to disclose and concealed that it was David Reynolds who decided who should serve on the board of directors and who should be put off the board.

45. These fraudulent mailings were intended to further defendants' scheme to

defraud the shareholders by deceiving the shareholders as to the actual control that the defendants had over Robertshaw which they were using for the benefit of Reynolds Metals, and to facilitate the acquisition of stock of Robertshaw Controls Company by Reynolds Metals, all in violation of 18 U.S.C. §1341.

46. The proxy statement of March 6, 1984 of Robertshaw also concealed the material fact that there was an agreement between Ralph Thomas and David Reynolds giving David Reynolds veto power over the items to be considered by the Board of Directors of Robertshaw. Items of importance to Robertshaw and to its shareholders which were opposed by David Reynolds would not even be considered. This arrangement was initiated by order of David Reynolds on September 15, 1983. This hidden agreement was a material

concealment designed to deceive and mislead the stockholders of Robertshaw concerning the control that David Reynolds and Reynolds Metals had over the conduct of Robertshaw, to defraud them of the loyal and faithful services of Robertshaw officers and directors and to facilitate the acquisition of stock of Robertshaw Controls Company by Reynolds Metals Company, all in violation of 18 U.S.C. §1341.

47. The proxy statement of March 6, 1984 of Robertshaw solicited votes for a meeting to be held April 11, 1984 for, among other purposes, the ratification of an Amendment to the 1972 Stock Option Plan. This Amendment would permit those persons who held options which allowed the purchase of Robertshaw stock to exercise those options by the surrender of Robertshaw stock instead of paying

cash. This provision to allow "The surrender of shares of common stock of the Company having a market value (determined on the basis of the closing price shown on the Composite Tape for the next preceding trading day) at the time equal to the Option Price" instead of cash, was equivalent to a tender at market price by Robertshaw. Since no disclosure was made in the proxy of the plans of Reynolds Metals to buy more Robertshaw shares, a plan known to David Reynolds, Reynolds Metals and Ralph Thomas, the amendment was designed to be, and was, a manipulative device intended to decrease the number of shares outstanding without increasing the stock price, thereby increasing their percentage of outstanding stock held by Reynolds Metals, and to facilitate the acquisition of stock of Robertshaw

Controls Company by Reynolds Metals all in violation of 18 U.S.C. §1341.

48. In or around April 1983, David Reynolds and Ralph Thomas caused to be mailed and delivered reports that the Robertshaw Board had adopted a policy of remaining independent. This announced policy of remaining independent was false and misleading in that it failed to disclose and concealed the plan of David Reynolds, Reynolds Metals and Ralph Thomas to have Reynolds Metals buy Robertshaw stock, raising its ownership to 50% of the outstanding Robertshaw stock, and then, when the price of Reynolds Metals Stock was higher relative to the price of Robertshaw stock Reynolds Metals would act to eliminate all the Robertshaw shareholders. The mailing of these reports was intended by the defendants to further their scheme and to

facilitate the acquisition of stock of Robertshaw Controls Company by Reynolds Metals Company, by discouraging other companies from acquiring Robertshaw stock, all in violation of 18 U.S.C. §1341.

49. On or about October 25, 1983, David Reynolds and Reynolds Metals announced the purchase by Reynolds Metals of the approximately 10% of Robertshaw stock owned by Ametek. That announcement said that although Reynolds Metals might acquire more shares, it had no present plans as to amounts, timing and methods. This statement was false as the defendants had already decided on a plan as to amounts and methods and in pursuance of this plan Reynolds Metals started buying shares in the open market on Monday, October 31, 1983, after the announcement. This mailing was designed

to mislead the public, to make them believe that Reynolds would not be buying in the near future, and to suppress the price, enabling Reynolds Metals, to pay a lower price to Robertshaw shareholders, for the exclusive benefit of Reynolds Metals, and to facilitate the acquisition of stock of Robertshaw Controls Company by Reynolds Metals, all in violation of 18 U.S.C.§1341.

50. On October 27, 1983, David Reynolds, and the Reynolds Metals Company caused a Form 13-D to be filed with the Securities and Exchange Commission covering the purchase of the 10% of Robertshaw. This filing was false and misleading, in that it failed to disclose that Reynolds Metals' purchase of this block was part of the defendants' plan for Reynolds Metals to acquire 50% of the outstanding Robertshaw shares and then to

act to eliminate all other Robertshaw shareholders. This filing was designed to mislead the public, to make them believe that Reynolds would not be buying in the near future, and to suppress the price, enabling Reynolds Metals to pay a lower price to Robertshaw shareholders, for the exclusive benefit of Reynolds Metals, and to facilitate the acquisition of stock of Robertshaw Controls Company by Reynolds Metals Company, all in violation of 18 U.S.C. §1341.

51. On or about April 12, 1984, Ralph Thomas caused a Robertshaw press release to be issued and mailed stating that Diamond had resigned as a Vice President and Director in December 1983. This statement was deceptive and was intended to deceive the public as to the firing of Diamond for his opposition to

the plan of the defendants, in violation of 18 U.S.C. §1341.

Count One - Violation of 18 U.S.C. §1962(b)
The Racketeer Influenced and Corrupt Organization Act

Defendants: David P. Reynolds
Reynolds Metals Company
Ralph S. Thomas

52. Paragraph 1 through 51 of this Complaint are realleged and incorporated herein.

53. This Count is based on the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §1961 et seq. ("RICO"), and is asserted against David P. Reynolds, Reynolds Metals Company and Ralph S. Thomas.

54. Section 1962(b) of RICO makes it unlawful for "any person through a pattern of racketeering activity...to acquire or maintain, directly or indirectly, any interest in or control of

any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce."

55. Robertshaw Controls Company is an "enterprise" as defined in 18 U.S.C. §1961(4) and is engaged in, and participates in activities which affect, interstate and foreign commerce.

56. Each of the individual defendants is a "person" as defined in 18 U.S.C. §1961(3) and was employed by and associated with, Reynolds Metals Company and Robertshaw Controls Company. Reynolds Metals Company and Robertshaw Controls Company are also such "persons".

57. As set forth above, defendants David P. Reynolds, Reynolds Metals Company and Ralph S. Thomas have acquired and maintained, directly and indirectly, an interest in and control of Robertshaw Controls Company through a pattern of

racketeering activity, as defined in 18 U.S.C. §1961(5) and as described above in paragraphs 1 through 51, in violation of 18 U.S.C. §1962(b), by having committed at least two acts of racketeering activity as defined in 18 U.S.C. §1961(1), including at least two acts of mail fraud, as defined under 18 U.S.C. §1341, at least one of which occurred after the effective date of RICO and the last of which occurred within ten years after the commencement of a prior act of racketeering activity.

58. Plaintiff Patrick H.Diamond has been injured in his business and property by reason of the violation of 18 U.S.C. §1962(b) by David P. Reynolds, Ralph S. Thomas and Reynolds Metals Company.

Count Two - Violation of 18 U.S.C. §1962(c)
The Racketeer Influenced and Corrupt Organization Act

Defendants: David P. Reynolds
Reynolds Metals Company
Ralph S. Thomas

59. Paragraphs 1 through 58 of this Complaint are realleged and incorporated herein.

60. This count is based on the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §1962(c), prohibiting "any person employed by or associated with an enterprise engaged in, or the activities of which effect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity" and is asserted against David P. Reynolds, Reynolds Metals Company and Ralph S. Thomas.

61. As set forth above, each of the defendants has participated in the conduct of the affairs of Robertshaw Controls Company through a pattern of racketeering activity as defined in 18 U.S.C. §1961(5) by having committed at least two acts of racketeering activity as defined in 18 U.S.C. §1961(1), including many more than two offenses involving mail fraud, as that offense is defined under 18 U.S.C. §1341, at least one of which has occurred after the effective date of RICO and the last of which has occurred within 10 years after the commencement of the prior act of racketeering activity.

62. Plaintiff Patrick H. Diamond has been injured in his business and his property by reason of the violation of 18 U.S.C. §1962(c) by David P. Reynolds,

Reynolds Metals Company and Ralph S. Thomas.

Count Three - Violation of 18 U.S.C. §1962(d) Racketeer Influenced and Corrupt Organization Act

Defendants: David P. Reynolds
Reynolds Metals Company
Ralph S. Thomas

63. Paragraphs 1 through 62 of this complaint are realleged and incorporated herein. This count is based on the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §1961 et seq and is asserted against David P. Reynolds, Reynolds Metals Company and Ralph S. Thomas.

64. Section 1962(d) of RICO makes it unlawful for "any person to conspire to violate any of the provisions of subsections...(b) or (c) of this section [1962]."

65. As set forth above, from at least February, 1982 through the date of the filing of this Complaint, defendants David P. Reynolds in his capacity as Chairman of the Board and Chief Executive Officer of Reynolds Metals Company, Reynolds Metals Company and Ralph S. Thomas conspired to violate 18 U.S.C. §1962(b) and 1962(c), in violation of 18 U.S.C. §1962(d).

66. Plaintiff Patrick H. Diamond has been injured in his business and property by reason of the violation of 18 U.S.C. §1962(d) by David P. Reynolds, Reynolds Metals Company and Ralph S. Thomas.

Count Four - Tortious Inference with Prospective Contractual Relation.

Defendant: David P. Reynolds

67. Paragraphs 1 through 66 of this

complaint are realleged and incorporated herein.

68. This claim is pendent to the federal causes of action in Counts One, Two and Three of this complaint.

69. Plaintiff Patrick H. Diamond's termination as an officer and director of Robertshaw Controls Company occurred within three years after a change of control of Robertshaw Controls Company.

70. Defendant David P. Reynolds tortiously interfered with the prospective contractual relation between Patrick H. Diamond and Robertshaw Controls Company by causing prospective severance agreement between Patrick H. Diamond and Robertshaw Controls Company to be amended by adding the "Reynolds exclusion" thereby causing injury to Patrick H. Diamond.

Count Five - Breach of Contract

Defendant: Robertshaw Controls Company

71. Paragraphs 1 through 70 of this Complaint are realleged and incorporated herein.

72. This claim is pendent to the federal causes of action in Counts One, Two and Three of this Complaint.

73. Robertshaw Controls Company violated and breached the severance agreement dated February 24, 1982 between Patrick H. Diamond and Robertshaw Controls Company by failing to pay to Patrick H. Diamond the termination compensation due and owing to Patrick H. Diamond pursuant to that severance agreement, thereby causing injury to Patrick H. Diamond.

Count Six - Wrongful Discharge

Defendants: David P. Reynolds
Ralph S. Thomas
Robertshaw Controls Company

74. Paragraphs 1 through 73 of this complaint are realleged and incorporated herein.

75. This claim is pendent to the federal causes of action in Counts One, Two and Three of this complaint.

76. The discharge of plaintiff Patrick H. Diamond by defendants David P. Reynolds, Ralph S. Thomas and Robertshaw Controls Company on November 18, 1983, was wrongful in that it was motivated by defendants' desire to prevent plaintiff Patrick H. Diamond from, and punish him for, faithfully, honestly and diligently performing, as a Robertshaw officer and director, the fiduciary duties owed to the company;s public shareholders.

77. David P. Reynolds, Ralph S. Thomas and Robertshaw Controls Company discharged Patrick H. Diamond with a specific intent to harm him.

78. This discharge of Patrick H. Diamond by David P. Reynolds, Ralph S. Thomas and Robertshaw Controls Company caused injury to Patrick H. Diamond.

Count Seven - Wrongful Discharge

Defendants: David P. Reynolds
Ralph S. Thomas
Robertshaw Controls Company

79. Paragraphs 1 through 78 of this Complaint are realleged and incorporated herein. This claim is pendent to the federal cause of action in Counts One, Two and Three of this Complaint.

80. At the time Patrick H. Diamond became an employee of Robertshaw Controls Company, Robertshaw Controls Company had in effect a "Quantity Price Adjustment"

program by which volume discounts and rebates were given to certain companies which purchased products from Robertshaw Controls Company.

81. The Quantity Price Adjustment program resulted in different purchasers of commodities of like grade and quality being charged different prices by Robertshaw Controls Company.

82. When Patrick H. Diamond learned of this price discrimination, he refused to sign any checks by which rebates were paid to various individuals and companies as a part of that program and he expressed to the general counsel of Robertshaw Controls Company the belief and opinion that the program was contrary to federal law.

83. David P. Reynolds, Ralph S. Thomas and Robertshaw Controls Company wrongfully discharged Patrick H. Diamond

in retaliation for Patrick H. Diamond's refusing to condone or participate in the above described Quantity Price Adjustment program.

84. The discharge of plaintiff Patrick H. Diamond by defendants David P. Reynolds, Ralph S. Thomas and Robertshaw Controls Company on November 18, 1983, was wrongful and violated the important public policy of insuring that the laws of the United States are not violated and that those citizens who refuse to participate in or condone the violation of such laws not be punished therefore.

85. The discharge of Patrick H. Diamond by David P. Reynolds, Ralph S. Thomas and Robertshaw Controls Company caused injury to Patrick H. Diamond.

Count Eight - Breach of Contract

Defendant: Robertshaw Controls Company

86. Paragraphs 1 through 85 of this Complaint are realleged and incorporated herein.

87. This claim is pendent to the federal causes of action in Counts One, Two and Three of this Complaint.

88. On November 18, 1983, Patrick H. Diamond signed an agreement with Robertshaw Controls Company which provided in part that Robertshaw Controls Company would continue to pay to Patrick H. Diamond his regular base salary through 1984, that his insurance benefits would be continued for that period and that he would be provided secretarial services during that period.

89. On or about June 1, 1984, the defendant Robertshaw Controls Company violated and breached the agreement dated

November 18, 1983 between Patrick H. Diamond and Robertshaw Controls Company by causing the discontinuance of all payments, support services, medical insurance and benefits provided for in the November 18, 1983 agreement, thereby causing injury to Patrick H. Diamond.

90. The discontinuance of the benefits due and owing to Patrick H. Diamond pursuant to the November 18, 1983 agreement was in retaliation for Diamond's assertion of his rights under the law and his filing of a lawsuit against the defendants.

Relief Sought

WHEREFORE, Patrick H. Diamond prays that judgment be entered in his favor as follows:

A. Pursuant to 18 U.S.C. §1964(a)

(i) immediately and permanently preventing and restraining the violation of 18 U.S.C. §1962 by David P. Reynolds and Ralph S. Thomas by ordering that Robertshaw Controls Company provide to Patrick H. Diamond all of the benefits so specified in the agreement of November 18, 1983.

(ii) immediately preventing and restraining David P. Reynolds and Ralph S. Thomas from punishing or attempting to intimidate any officer, director or employee of Robertshaw Controls Company for opposing or objecting to the takeover of Robertshaw Controls Company and the continuation of any scheme to defraud the shareholders of Robertshaw Controls Company of the loyal and faithful services of Robertshaw's officers and directors.

(iii) immediately preventing and restraining the appointment or election to the Board of Directors of Robertshaw Controls Company of any person who is or at any time has been an employee, officer or director of either the Reynolds Metals Company or any of its affiliates, other than Robertshaw Controls Company.

(iv) ordering David P. Reynolds and Reynolds Metals Company not to vote any shares in which they have any interest, direct or indirect, in Robertshaw Controls Company.

(v) ordering David P. Reynolds and Reynolds Metals Company to refrain from acquiring any further interest, direct or indirect, in Robertshaw Controls Company.

(vi) ordering David P. Reynolds and Reynolds Metals Company to divest

themselves of any interest, direct or indirect, in Robertshaw Controls Company.

(vii) ordering that David P. Reynolds and anyone who at any time was an employee or director of the Reynolds Metals Company, be removed as a Director of Robertshaw Controls Company.

(viii) ordering that David P. Reynolds not serve in any capacity as a trustee, director, fiduciary or administrator of any investment plan of the Reynolds Metals Company (including the retirement plans, the Savings and Investment Plan, the Tax Reduction Act Stock Ownership Plan and the Incentive Compensation Plan) or the Reynolds Metals Company Foundation or of any other company plan in which funds are invested on behalf of or for the benefit of others.

(ix) ordering that Ralph S. Thomas be removed as a Director of the Reynolds Metals Company.

B. Awarding Patrick H. Diamond alll damages, compensatory and punitive, against the defendants;

C. Trebling all damages as required by 18 U.S.C. §1964(c).

D. Awarding Patrick H. Diamond the costs of this suit, including reasonable attorneys' fees, pursuant to 18 U.S.C. §1964(c).

E. Granting all other and further relief that the Court deems just and proper.

PRICKETT, JONES, ELLIOTT, KRISTOL & SCHNEE

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Dated:

APPENDIX D

EXTENT OF
SHEPARD'S CITATIONS

(SEDIMA V. IMREX)

P. 789 & p. 790

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VOL. 87 JULY, 1988 NO. 2

(IN FOUR PARTS) PART 1A

SEMIANNUAL CUMULATIVE SUPPLEMENT

Shepard's UNITED STATES Citations

(USPS 605470)

CASES
US, VOLS. 1-477

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No. 88-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICK H. DIAMOND,

Petitioner,

v.

DAVID P. REYNOLDS and
REYNOLDS METALS COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

JEFFREY A. BARIST, ESQ.*
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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Does this Court's decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), grant standing under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, to a dismissed employee to sue the largest shareholder of his former employer and its Chairman of the Board for wrongful discharge where there is not any allegation that his injury flowed from any of the predicate acts constituting the pattern of racketeering?

STATEMENT OF THE PARTIES TO THIS PROCEEDING

The parties to the proceeding below were petitioner Patrick H. Diamond, respondents David P. Reynolds and Reynolds Metals Company, and two other parties, Ralph S. Thomas and Robertshaw Controls Company, neither of whom is a respondent to the instant petition.

In addition to its wholly owned subsidiaries, Reynolds Metals Company is affiliated with the following entities:

1401 17th Street Associates
Aleurope (France) S.A.
Alpart Farms (Jamaica), Ltd.
Alpart Jamaica Inc.
Alternative Housing Associates
Alumina Partners of Jamaica
Aluminerie de Becancour Inc.
Aluminio del Caroni, S.A.
Aluminio Reynolds del Peru Sociedad Anonima
Aluminio Reynolds, Santo Domingo, S.A.
Aluminium Europe S.A., En Abrege: "Aleurope S.A."
Aluminium-Oxid-Gemeinschaft Stade
Aluminium Oxid Stade Gesellschaft mit beschrankter Haftung
Aluminum Corporation of the Philippines
Asociacion Venezolana de Adiestramiento y Desarrollo del Aluminio (AVADAL)
Austria Dosen Gesellschaft mbH & Co. KG
Austria Dosen GmbH
Bartram Airplex Incorporated
Becancour Joint Venture
Bennett Manor Associates
Bevco Containers
Boddington Housing Pty. Ltd.
Broward Lakes Business Park Joint Venture
Burrstone Associates
Bushnell Plaza Development Corporation
Capitol Hill Associates, Ltd.

Cathedral Square Associates
Cathedral Square Associates II
Chasco Woods Associates, Ltd.
Chasco Woods Associates II, Ltd.
Compania Metalurgica Colombiana, S.A. "Comecol"
Crown Oak Associates of Penfield
Curtis Apartments Associates
Cypress Courts Associates, Ltd.
Cypress Cove Associates, Ltd.
Drew Gardens Associates, Ltd.
Eastwick Joint Venture I
Eastwick Joint Venture IV
Eastwick Joint Venture V
Eastwick Joint Venture VI
Egyptian Aluminium Products Company
Envases Valencianos, S.A.
Envases y Alimentacion Madrid, S.A.
Envases y Alimentacion, S.A.
Eskimo Europ, S.a.r.l.
Eskimo Pie Corporation
Eskimo Pie Corporation of Canada, Limited
Gerro Reynolds Dosenwerk GmbH & Co. KG
Grafiba Sociedad Anonima
Halco (Mining) Inc.
Hamburger Aluminium-Werk Gesellschaft mit beschrankter Haftung
Industria Navarra del Aluminio, S.A.
Industrias Lacteas del Yocoima, S.A.
Industrias Metal-Mecanicas del Quindio S.A.
Iranian Aluminium Co. (Sherkat Sahami Iran Aluminium)
Jamaica Alumina Security Company, Ltd.
Kimbrook Manor Associates
Lakeside Village Associates
Lynx-Canada Explorations Limited
Manicouagan Power Company - La Compagnie Hydroelectrique Manicouagan

Midtown Associates
Mill Pond Development Corporation
Mill Pond Towers Associates
Minas do Dragao Ltda.
Mineracao Rio do Norte S.A.
Mineracao Sao Jorge Ltda.
Mineradora de Bauxita Ltda.
Minerais de Aluminio Ltda.
Mount Gibson Joint Venture
The National Housing Partnership
New Eastwick Corporation
Oceanside Estates Associates, Ltd.
One Empire Plaza Associates
Pechiney Reynolds Quebec, Inc.
Phillips-C.B.A. Conductors Limited
Presidential Development Corporation
Presidential Manor Corporation
Rayburn Manor Associates
Regency Joint Venture
Regency West Associates
Reynolds Gilbane Realty Associates
The Reynolds-Gilbane-Weybosset Joint Venture
Reynolds Metals Development Company
Reynolds Philippine Corporation
Reynolds Regency Corporation
Reywest Development Company
Reywest Development Corporation
Ruedas de Aluminio C.A. "RUALCA"
Sherkat Sahami Iran Aluminium (Iranian Aluminium Co.)
Southeast Vinyl Company
Superenvases Envalic C.A.
Titusville Manor Associates
Union Industrial y Astilleros Barranquilla "Unial" S.A.
Venezolana De Aleaciones, S.A. "VALSA"
Volta Aluminium Company Limited
Weybosset Hill Development Corporation
Windermere Associates, Ltd.
Worsley Alumina Pty. Ltd.

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NEWSPAPER

The Wall Street Journal, Sept. 23, 1986, at 4, col. 1 15

No. 88-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICK H. DIAMOND,

Petitioner,

v.

DAVID P. REYNOLDS and
REYNOLDS METALS COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Opinions Below

The opinion of the Court of Appeals for the Third Circuit is attached as Appendix A to the petition. Copies of the opinions issued by the district court resulting in the dismissal before trial of all claims against respondents are attached as Appendix B to the petition. A copy of the opinion issued by the district court after a bench trial dismissing the remaining causes of action against one defendant not involved in this petition is in the Appendix hereto. None of these opinions has been reported.

Statutes Involved

The following statutes are cited in this Brief and reproduced in the Appendix:

Racketeer Influenced and Corrupt Organizations Act:

18 U.S.C. § 1962 (1982)

18 U.S.C. § 1964(c) (1982)

Jurisdiction

The judgment of the court of appeals was entered June 22, 1988. The petition for a writ of certiorari was filed September 19, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

I.

Statement

A. *Introduction*

The Third Circuit, affirming the district court, held that petitioner, the dismissed chief financial officer of Robertshaw,[1] did not have standing under RICO to sue RMC (at the time of the dismissal the largest shareholder of Robertshaw), Reynolds (then chairman of the board and chief executive officer of RMC and the non-executive chairman of Robertshaw), Robertshaw and Thomas (then chief executive officer of Robertshaw) for wrongful discharge.[2] Petitioner would have this Court resolve

---

[1] As used herein, "RMC" refers to Reynolds Metals Company; "Robertshaw" refers to Robertshaw Controls Corporation; "Reynolds" refers to David P. Reynolds; and "Thomas" refers to Ralph S. Thomas. References to "Pet. App." are to the appendix to the petition. References to "Opp. App." are to the appendix to Brief for the Respondents in Opposition. A copy of the Second Amended Complaint is attached as Appendix C to the petition. Because petitioner's Appendix C is not paginated, citations to it are in the form "Second Amended Complaint ¶ ___ (Pet. App. C)." "JA" refers to the Joint Appendix below.

[2] The original Complaint was filed May 15, 1984 before the United States District Court for the District of Delaware; a First Amended Complaint was filed July 9, 1984; a Second Amended Complaint was filed March 5, 1985. The RICO Counts (Counts One through Three), and claims under state law

(Footnote continued)

a non-existent conflict among the circuits and review a decision of the Third Circuit that applied this Court's decision in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), in a straightforward and unexceptional way, all to devise a new standard of RICO standing that petitioner could not meet were it to be created.

The district court and the Third Circuit correctly held that petitioner's Second Amended Complaint does not plead the necessary factual nexus between his alleged injury, his purportedly wrongful discharge, and the alleged predicate acts, the supposed mail fraud violations. The court below, ruling on the Complaint before it, held in a manner consistent with *Sedima* and every court of appeals decision to date, that a dismissed employee who fails to plead that his dismissal flowed from the commission of the predicate acts lacks standing to sue under RICO. Nor could petitioner meet the RICO standing requirement he asserts to be proper. The district court, in a bench trial, specifically found that the centerpiece of petitioner's RICO fantasy, RMC's "plan" to purchase Robertshaw on the cheap, did not exist. The trial record established that petitioner did nothing to manifest "opposition" to this non-existent plan (allegedly why he was fired). As it ultimately turned out, the "plan" never occurred because a third party, not RMC, bought Robertshaw.

---

for wrongful discharge (Counts Six and Seven), were dismissed by the district court for failure to state a claim. *Diamond* v. *Reynolds*, No. 84-280 (D. Del. Jan. 13, 1986) (Pet. App. B at 21). Count Four, which alleged tortious interference with a prospective contractual relation, was dismissed on summary judgment. *Diamond* v. *Reynolds*, No. 84-280 (D. Del. July 15, 1986)(Pet. App. B at 70). Counts Five and Eight, claims against Robertshaw for breach of contract, were tried to the district court in a bench trial, resulting in a judgment for that defendant. *Diamond* v. *Reynolds*, No. 84-280 (D. Del. Aug. 28, 1987) (Opp. App. A4-A29). Both Counts incorporated the allegations relating to the alleged RICO violations. *See* Second Amended Complaint ¶¶ 71, 86 (Pet. App. C). The Third Circuit affirmed the district court's various opinions dismissing all the petitioner's claims, but reversed and remanded the entry of judgment against petitioner on Robertshaw's counterclaim. On August 15, 1988, petitioner exchanged general releases with Thomas and Robertshaw. Thereafter, petitioner filed the instant petition for a writ of certiorari.

B. *The Second Amended Complaint Does Not Plead Any Factual Nexus Between Petitioner's Dismissal And The Alleged Predicate Acts*

The three RICO Counts rest upon petitioner's allegations that RMC, Reynolds and Thomas failed to disclose a scheme to control and ultimately take over Robertshaw, allegedly to defraud the Robertshaw shareholders by buying Robertshaw at the lowest possible cost.[3] *See generally* Second Amended Complaint ¶¶ 11-12, 31-51 (Pet. App. C). Petitioner alleges that the failure to disclose this "scheme" injured the Robertshaw shareholders. *See, e.g., id.* ¶¶ 32-51 (Pet. App. C). Petitioner sues only as a former Robertshaw employee, officer and director, and does not allege that he was a Robertshaw or RMC shareholder. *Id.* ¶ 1 (Pet. App. C). Petitioner also does not allege that respondents devised a scheme to defraud him, or that he relied on or was injured by any of the alleged misrepresentations in or omissions from any of the allegedly fraudulent documents to his detriment. To attempt to meet the statutory requirements that respondents engaged in a "pattern of racketeering," petitioner alleges twelve purported separate mail fraud violations by the respondents. In each instance, the parties allegedly deceived were the Robertshaw shareholders or the public, not petitioner:

- ¶ 35: "scheme to defraud the shareholders"
- ¶ 36: misrepresentation "designed to deceive and mislead the stockholders of Robertshaw"
- ¶ 38: "deceive the public, including many shareholders of Robertshaw"
- ¶ 40: "deceive and mislead the stockholders"
- ¶ 42: "deceive and mislead the shareholders"

---

[3] Respondents noted below that there is nothing criminal in seeking to buy at the lowest price, and that petitioner's allegations of a "plan" to do so would not make the conduct criminal or fraudulent had it occurred.

- ¶ 45: "defraud the shareholders"
- ¶ 46: "deceive and mislead the stockholders of Robertshaw"
- ¶ 47: "a manipulative device intended to decrease the number of [Robertshaw] shares outstanding without increasing the stock price"
- ¶ 48: scheme "to eliminate all the Robertshaw shareholders"
- ¶ 49: a mailing "designed to mislead the public"
- ¶ 50: filed a Form 13-D "designed to mislead the public"
- ¶ 51: press release "intended to deceive the public."

See also Second Amended Complaint ¶ 10 (Reynolds and Thomas violated "their fiduciary duty to all the shareholders of Robertshaw . . . .") (Pet. App. C).[4]

At no point does the Second Amended Complaint suggest that petitioner was ever solicited to join the violations, that is, to participate in the preparation and delivery of the materials sent to shareholders that allegedly form the predicate acts of mail fraud. The pleading is barren of any allegation that respondents sought petitioner's cooperation in the alleged scheme. This is not a case in which a dismissed employee has alleged he was fired for refusing to join in the commission of the predicate acts.

---

[4] Respondents further argued below that none of the predicate acts alleged pleaded violations of the mail fraud statute because each depends upon taking an objectively lawful act or statement and asserting that it is fraudulent because it failed to disclose the hidden culpable motivation of the actors. The cases are legion, however, refusing to find fraudulent the allegation that the defendants perpetrated a material omission "when they failed to 'discover and adjudge . . . faithless motives for their actions . . . .'" *Biesenbach* v. *Guenther*, 588 F.2d 400, 402 (3d Cir. 1978) (citations omitted).

The Second Amended Complaint is barren of any allegation that petitioner's injury, his "wrongful discharge," flowed from the commission of the alleged predicate acts, the mail fraud violations, and specifically disavows any nexus between the alleged predicate acts and petitioner's injury. Instead, the Second Amended Complaint pleads that petitioner's injury arose from his being fired. His discharge is linked to the alleged scheme by the conclusory allegation that the respondents "caused the firing [of petitioner] to punish him for his opposition to the plan of the defendants . . . ." Second Amended Complaint ¶ 12(E) (Pet. App. C).

Petitioner is totally silent as to what constituted his purported "opposition" or how it was manifested. After alleging in his 45-page Second Amended Complaint an elaborate scheme to defraud the Robertshaw shareholders and to take over Robertshaw, petitioner refers only to "his opposition" to the alleged scheme that supposedly occurred throughout the more than three years he was a Robertshaw officer and director. At no point does the Second Amended Complaint allege what petitioner did to disclose publicly his opposition to respondents' alleged scheme, when the opposition became known, and what, if anything, he did to manifest his alleged opposition so as to give respondents reason to discharge him. Nowhere does petitioner allege what he did to "oppose" or to take action against that alleged scheme. Petitioner does not allege any connection between any of the mailings and petitioner's alleged "opposition." Nor does he explain why if, as he alleges, he opposed the "scheme" during the more than three years he was a Robertshaw officer and director, respondents waited three years to get rid of him.

C. *The Decisions Below*

The district court dismissed the three RICO Counts on the grounds that petitioner had failed to state a cause of action. *Diamond* v. *Reynolds*, No. 84-280 (D. Del. Jan. 13, 1986) (Pet. App. B at 26). Following and applying the then recent Supreme Court holding in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), the district court concluded that petitioner did not have

standing and had failed to allege and establish that his injury had been caused by any of the predicate acts, *i.e.*, mail fraud violations, purportedly constituting the "pattern of racketeering activity." *Diamond* v. *Reynolds*, No. 84-280 (D. Del. Jan. 13, 1986) (Pet. App. B at 10).

The Third Circuit Court of Appeals (Becker, Hutchinson and Scirica, Circuit Judges) upheld the district court's decision. *Diamond* v. *Reynolds*, No. 87-3643 (3d Cir. June 22, 1988) (Pet. App. A). In accordance with the holding of *Sedima* and the appellate cases following *Sedima*, the court below observed that to have standing, petitioner's injury must be an " 'injury flowing from the commission of the predicate act, not injury flowing from the pattern of such acts.' " *Id.* (quoting *Town of Kearny* v. *Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1268 (3d Cir. 1987)) (Pet. App. A at 8). The court below affirmed the dismissal of the RICO Counts because:

> Diamond's dismissal did not flow from the commission of the predicate acts, which involved mailings to [Robertshaw] shareholders concerning the acquisition of [Robertshaw] stock.

Id. (Pet. App. A at 8).

The court agreed with decisions in other circuits, stating that:

> whether Diamond was discharged in retaliation for objecting to the alleged conspiracy or to prevent him from reporting the conspiracy, he does not have RICO standing. *See Pujol* v. *Shearson*, 829 F.2d 1201, 1205 (1st Cir. 1987); *Nodine* v. *Textron*, 819 F.2d 347, 348 (1st Cir. 1987); *Morast* v. *Lance*, 807 F.2d 926, 929 (11th Cir. 1987). Diamond was not a target – either directly or indirectly – of the alleged criminal conduct, and his discharge cannot provide basis for RICO standing. The district court properly held that Diamond's discharge was not sufficiently linked to the predicate acts that comprised the pattern of racketeering activity.

Id. (footnote omitted) (Pet. App. A at 9-10).

The court below also noted that its holding did not mean that discharged employees may never bring a RICO action against its employers, observing that those who are fired for refusing to join a RICO conspiracy present a different issue which may permit recovery under RICO. This, however, is not petitioner's case. Finding that "Diamond never claimed that: (1) appellees solicited his membership in the scheme; or (2) he refused their offer," the court of appeals left this issue for another day. *Id.* (Pet. App. A at 10 & n.2).

II.

Summary Of Argument

The decision below does not conflict with this Court's decision in *Sedima*. The court of appeals held that a plaintiff who does not allege injury flowing from the commission of the predicate acts constituting the alleged RICO violations does not have standing. Petitioner's Second Amended Complaint is barren of any allegation that could establish the necessary factual nexus. This decision is correct and does not conflict with that of any other court of appeals.

In addition, the district court's finding after a bench trial and left undisturbed on appeal, that RMC, Reynolds and Thomas had no plan to take over Robertshaw, would defeat any claim that petitioner was dismissed because he opposed the purported plan. Further review is unwarranted.

III.

Reasons For Denying The Writ

A. *There Is No Conflict Between The Decision Of The Court Of Appeals And This Court's Opinion In* Sedima

A RICO plaintiff has standing to sue only if "he has been injured . . . by the conduct constituting the violation." *Sedima, S.P.L.R.* v. *Imrex Co.*, 473 U.S. 479, 496 (1985). The conduct constituting the violation is, of course, the commission of the underlying predicate acts in connection with the conduct of the enterprise:

> [w]here the plaintiff alleges each element of the [RICO] violation, the compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. . . . Any recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.

Id. at 497 (footnote omitted). *See also Haroco, Inc.* v. *American National Bank & Trust Co.*, 747 F.2d 384, 398 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985) (*per curiam*) ("[T]his 'by reason of' language [in 18 U.S.C. § 1964(c)] . . . simply imposes a proximate cause requirement on plaintiffs. The criminal conduct . . . must, directly or indirectly, have injured the plaintiff's business or property."). RICO thus does not shield every injury, nor does it insure against every wrong that can be traced to a predicate act. As this Court explained, a RICO defendant who violates section 1962 " 'is not liable for treble damages to everyone he might have injured by other conduct, nor is the defendant liable to those who have not been injured.' " *Sedima*, 473 U.S. at 496-97 (quoting *Haroco*, 747 F.2d at 398).

Sedima and *Haroco* thus establish that for purposes of determining whether RICO standing exists, the allegations in a complaint must show that the alleged injury was proximately caused by the predicate acts. The inquiry is not, as petitioner suggests, whether a RICO plaintiff "has alleged a direct or indirect injury, but rather whether he or she has alleged an injury that 'flows from' the predicate acts." *Bass* v. *Campagnone*, 838 F.2d 10, 12 (1st Cir. 1988). *Accord Sperber* v. *Boesky*, 849 F.2d 60, 64 (2d Cir. 1988) ("It is clear that both direct and indirect injuries must be proximately caused."). The resolution of this inquiry necessarily turns on the particular facts alleged in the complaint. *National Enterprises, Inc.* v. *Mellon Financial Services Corp. Number 7*, 847 F.2d 251, 254 (5th Cir. 1988) ("[W]hether a given party has suffered a RICO injury is a fact-heavy question.").

Instead of relying on the "direct/indirect injury" dichotomy petitioner advances, the court below properly focused its inquiry on whether the injury allegedly suffered flowed from the commission of the predicate acts. It found that petitioner's Second Amended Complaint did not allege the necessary causal relationship between his claimed injury, *i.e.*, the "wrongful discharge," and the mail fraud violations said to have been committed by Reynolds, RMC and Thomas in connection with Robertshaw's conduct. Specifically, it held:

> Diamond's dismissal did not flow from the commission of the predicate acts, which involved mailings to [Robertshaw] shareholders concerning the acquisition of [Robertshaw] stock.
>
> . . . Diamond was not a target – either directly or indirectly – of the alleged criminal conduct, and his discharge cannot provide the basis for RICO standing.

Diamond v. *Reynolds*, No. 87-3643 (3d Cir. June 22, 1988) (Pet. App. A at 8-9).

There is thus no conflict between *Sedima* and the decision of the court below. The court of appeals accurately interpreted *Sedima* and correctly applied it to the facts before it.

B. *There Is No Conflict Among The Circuit Courts About Whether A Dismissed Employee Has RICO Standing Under The Circumstances In This Case*

Following *Sedima*, every court of appeals addressing this issue has rejected the notion that an employee who has lost his job, but who has not been injured by any of the alleged predicate acts, has standing to bring a RICO action against his former employer.

In *Pujol* v. *Shearson/American Express, Inc.*, 829 F.2d 1201, 1204-05 (1st Cir.), *amended*, No. 87-1190, slip op. (1st Cir. Nov. 19, 1987), plaintiff alleged that his former employer and agents violated the law by engaging in illegal banking transactions, defrauding investors and furthering such misdeeds through the use of the mail and wires. Finding that plaintiff "was not a defrauded client or investor and was not a target of any of the acts pleaded as 'predicate acts' in the RICO claim," the Court of Appeals for the First Circuit dismissed the complaint. 829 F.2d at 1205. Similarly, in *Nodine* v. *Textron, Inc.*, 819 F.2d 347, 348 (1st Cir. 1987), the dismissed employee alleged that defendants were guilty of mail and wire fraud, obstruction of justice, obstruction of a criminal investigation, and interference with commerce. The First Circuit dismissed the complaint because "[n]one of these alleged offenses harmed Nodine in his business or property." *Id.* at 349 (footnote omitted). In *Morast* v. *Lance*, 807 F.2d 926, 929 (11th Cir. 1987), the employee alleged he was fired for reporting a banking irregularity and cooperating with a subsequent investigation. The Eleventh Circuit held plaintiff lacked standing under RICO because his discharge "did not flow directly from the predicate acts, the defendants' banking violations." *Id.* at 933 (footnote omitted).

This case is, then, not an appropriate vehicle to interpret the possible basis for a RICO action by a dismissed employee. As

seen, there is no conflict among the circuit courts about whether a former employee, such as petitioner, has standing to sue his employer under RICO.[5]

C. *There Is No Conflict Among The Circuit Courts About Whether* Sedima *Expanded Or Restricted Standing Under RICO*

Petitioner incorrectly suggests that there is a conflict among the circuit courts about the proper interpretation of *Sedima* and, in particular, about whether a plaintiff who alleges an indirect injury has RICO standing. Each court of appeals referred to by petitioner acknowledges that the proper inquiry under *Sedima*, as well as *Haroco*, is whether the alleged injury flows from the commission of the predicate acts — not whether the injury is "direct" or "indirect." *See Sperber* v. *Boesky*, 849 F.2d at 64 ("It is clear that both direct and indirect injuries must be proximately caused."); *National Enterprises* v. *Mellon Financial Services*, 847 F.2d at 254 (failure to allege that injury flowed from commission of predicate acts fatal to complaint); *Flip Side Productions, Inc.* v. *Jam Productions, Ltd.*, 843 F.2d 1024, 1035 (7th Cir.), *cert. denied*, 57 U.S.L.W. 3280 (Oct. 17, 1988) (quoting *Haroco*, court observed that " 'by reason of' language

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[5] The only cases petitioner cites finding that a dismissed employee has RICO standing are district court opinions. This alleged conflict, of course, is ordinarily not sufficient grounds for granting certiorari. *See* Rule 17 of this Court. In any event, these decisions are inapposite to this action or incorrectly set forth the governing law. *Acampora* v. *Boise Cascade Corp.*, 635 F. Supp. 66, 69 (D.N.J. 1986), and *Callan* v. *State Chemical Manufacturing Co.*, 584 F. Supp. 619 (E.D. Pa. 1984), arose in the Third Circuit and thus, after *Reynolds* v. *Diamond*, are of no precedential value. *Komm* v. *McFliker*, 662 F. Supp. 924 (W.D. Mo. 1987), involved a self-described "whistle-blower" which petitioner is not. *Williams* v. *Hall*, 663 F. Supp. 639 (E.D. Ky. 1988), is primarily concerned with standing to sue under 18 U.S.C. § 1962(d) (the conspiracy section). To the extent *Williams* grants standing even where the "overt act" that causes the injury is not a predicate act constituting part of the pattern of RICO violations it disregards the admonition in *Sedima* that the injury that confers standing on a RICO plaintiff is injury flowing "from the commission for the predicate acts." *Sedima*, 473 U.S. at 497 (footnote omitted).

[in § 1964(c)] . . . imposes a proximate cause requirement on plaintiffs"); *Bass* v. *Campagnone*, 838 F.2d at 12 ("[T]he inquiry [is] not whether the plaintiff has alleged a direct or indirect injury, but rather whether he or she has alleged an injury that 'flows from' the predicate acts."); *Grantham & Mann, Inc.* v. *American Safety Products, Inc.*, 831 F.2d 596, 606 (6th Cir. 1987) (failure to show either injury or proximate causation fatal to a § 1964(c) RICO claim); *Morast* v. *Lance*, 807 F.2d at 933 (Plaintiff's discharge "did not flow directly from the predicate acts . . . ."); *Miller* v. *Glen & Helen Aircraft, Inc.*, 777 F.2d 496, 499 (9th Cir. 1985) ("[T]he complaint properly alleges compensable injury flowing from the commission of the predicate acts."); *Terre Du Lac Ass'n* v. *Terre Du Lac, Inc.*, 772 F.2d 467, 473 (8th Cir. 1985), *cert. denied*, 475 U.S. 1082 (1986) (Quoting *Sedima*, the court observed that "'[a]ny recoverable damages occurring by reason of a violation of § 1962(c) will flow from the commission of the predicate acts.'").

There is no need, as petitioner suggests, to review *Sedima* in light of this action. As these cases show, the circuit courts agree that the focus for determining standing is whether there is a causal nexus between the alleged injury and the predicate acts.

D. *Petitioner Seeks A Rule Of Standing He Could Not Meet Were It To Be Created*

Petitioner's assertion that he should have standing to assert a cause of action under RICO rests on his claim that he was fired because of his alleged opposition to a conspiracy by which RMC would take over Robertshaw at a price favorable to RMC to the detriment of the Robertshaw shareholders. The bench trial held on petitioner's claims against Robertshaw for breach of contract[8] considered this issue, and the district court specifically found that the "plan" did not exist: "plaintiff has failed to persuade the Court that Reynolds Metals had a 'plan' to acquire Robertshaw." *Diamond* v. *Reynolds*, No. 84-280 (D. Del. Aug. 28, 1987) (footnote omitted) (Opp. App. A25).

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[8] *See* Opp. App. A4-A29.

The district court's finding that Reynolds, RMC and Thomas did not have a "plan" to take over Robertshaw is fatal to petitioner's RICO claims. Petitioner cannot assert he was fired for "opposition" to an illegal plan that never existed. Were this Court to reverse the decision below and grant petitioner standing, petitioner would be estopped from asserting the existence of the "plan" he asserts is crucial to his claim of mail fraud. *See, e.g., Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313 (1971); *LaVay Corp.* v. *Dominion Federal Savings & Loan Ass'n*, 830 F.2d 522 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 1027 (1988).

The record before the district court further established that petitioner's "opposition" to the non-existent scheme of Thomas, Reynolds and RMC to buy Robertshaw was equally non-existent. Not once did petitioner tell a single director, warn any official from the Securities and Exchange Commission, or do anything to manifest his opposition, although he testified he had long discovered the alleged "conspiracy." (JA 421-22, 425-27.) So, far from being at daggers-drawn with respondents who, according to petitioner, fired him for opposition to their scheme, petitioner sought and received their aid. The day after he was discharged, petitioner requested Thomas (one alleged conspirator) to ask Reynolds (the main alleged conspirator) for assistance in obtaining a job with RMC (the supposed beneficiary of the conspiracy). (JA 483-86, 566.)[7]

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[7] There are two final codas to the scenario set forth in the petition. Subsequent to the date of the district court's decision dismissing the Second Amended Complaint, Siebe PLC purchased all of Robertshaw's stock, including that owned by RMC, at a very substantial premium above market. The transaction is reported in The Wall Street Journal, September 23, 1986, at 4, col. 1. This sale at a premium to a third party is of course what petitioner alleges RMC conspired to prevent. Second, subsequent to the filing of the Complaint, petitioner was found guilty of filing criminally false tax returns for 1980 and 1981, while he was serving as Robertshaw's chief financial officer (*United States* v. *Diamond*, No. 85-5259, slip op. (E.D. Va. Sept. 27, 1985), *aff'd*, 788 F.2d 1025 (4th Cir. 1986)), thus providing cause for any discharge.

Conclusion

For the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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Dated: October 24, 1988

APPENDIX

Section 1962 of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962 (1982)

§ 1962. Prohibited activities.

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Section 1964(c) of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c) (1982)

§ 1964. Civil remedies.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

PATRICK H. DIAMOND,	:	
Plaintiff,	:	
v.	:	Civil Action No. 84-280 MMS
DAVID P. REYNOLDS, REYNOLDS METALS COMPANY, RALPH S. THOMAS and ROBERTSHAW CONTROLS COMPANY,	:	
Defendants.	:	

William Prickett, Esquire, and Norman Pernick, Esquire, of Prickett, Jones, Elliott, Kristol & Schnee, Wilmington, Delaware. Harold E. Kohn, Esquire, and Joanne Zack, Esquire, of Kohn, Savett, Klein & Graf, Philadelphia, Pennsylvania. Attorneys for Plaintiff.

Allen M. Terrell, Jr., Esquire, of Richards, Layton & Finger, Wilmington, Delaware. Attorneys for Defendant Robertshaw Controls Company.

MEMORANDUM OPINION

Dated: August 28, 1987
Wilmington, Delaware

SCHWARTZ, Chief Judge

Plaintiff Patrick H. Diamond claims, in Counts Five and Eight of his second amended complaint, that defendant Robertshaw

Controls Company ("Robertshaw") breached a severance agreement dated February 24, 1982 and a termination agreement dated November 18, 1983. The remaining counts of the second amended complaint have been disposed of by previous orders of the Court.[1] Robertshaw counterclaims that Diamond breached the termination agreement.

On February 9, 10, and 11, 1987, a bench trial was held on the breach of contract claims. The parties filed post-trial briefs, and oral argument was held on July 14, 1987. The following constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52(a).

I. FINDINGS OF FACT

A. *Background*

Plaintiff Diamond was Chief Financial Officer of Robertshaw from June 1980 until his departure from the company in November 1983. Trial Transcript ("Tr.") A14. He had started with Robertshaw in April 1978 as Vice President, Finance. In April 1980, Diamond joined the company's board of directors. Tr. A13-A14.

Defendant Robertshaw, a Delaware corporation with its principal place of business in Virginia, was formed by Reynolds Metals Company ("Reynolds Metals") in the 1940's. Tr. B134-B135. Thereafter, Reynolds Metals placed 50 percent of

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[1] Counts One through Three alleged violations by defendants David P. Reynolds ("Reynolds"), Reynolds Metals Company ("Reynolds Metals"), and Ralph S. Thomas of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.* The Court dismissed the RICO counts as to Reynolds and Reynolds Metals on January 13, 1986 and granted Thomas' motion for summary judgment on these counts on July 15, 1986. Count Four alleged tortious interference with prospective contractual relations against defendant Reynolds. The Court granted Reynolds' motion for summary judgment on this count on July 15, 1986. Counts Six and Seven alleged defendants Reynolds, Thomas, and Robertshaw wrongfully discharged plaintiff. The Court dismissed the wrongful discharge counts as to Reynolds on January 13, 1986 and granted Thomas' and Robertshaw's motion for summary judgment on these counts on July 15, 1986. Robertshaw is the sole remaining defendant in the case.

Robertshaw's stock on the market. Tr. B135. The amount of Robertshaw stock held by Reynolds Metals had decreased to about 30 percent by the time Diamond joined Robertshaw in 1978. Tr. B135. Reynolds Metals was always represented on Robertshaw's board of directors; at all times relevant to this suit, the chairman of the board and chief executive officer of Reynolds Metals was also chairman of the board of Robertshaw. Tr. B136. From 1978 until late 1983, three directors on Robertshaw's fifteen-member board were also employees of Reynolds Metals; thereafter and until 1986, five members of Robertshaw's board were also Reynolds Metals employees. Tr. B137-B138.

In September 1980, following a period of unusual activity in the trading of Robertshaw stock, Robertshaw initiated a number of responses to the possibility of a takeover attempt. Tr. B143. The company retained Mr. Martin Lipton of the Wachtell, Lipton, Rosen & Katz law firm and the investment banking firm of Dillon, Read & Co. Tr. A19-A21, B143; *see* Plaintiff's Trial Exhibit ("PX") 11 (minutes of September 18, 1980 executive committee meeting). Robertshaw also formed the Special Shareholders Committee ("SSC"), which was to monitor possible attempts to acquire Robertshaw and recommend responses to such attempts. Tr. A22-A23, B230. The SSC's members included Diamond; Ralph S. Thomas, president and chief executive officer of Robertshaw and a member of Robertshaw's board of directors; and Joseph A. Howell, Jr., Robertshaw's senior vice president and general counsel. *See* Tr. A21-A22.

The SSC recommended, among other things, that Robertshaw publicly proclaim its independence. Tr. A27, B145. The Robertshaw board subsequently determined that "given the Company's projections and potential for future growth, it is in its best interests to continue to remain an independent business entity." PX 24 (minutes of April 8, 1981 board meeting); *see* Tr. A28-A29, B145. Thereafter, Robertshaw publicly reiterated this policy of independence. *See* PX 49 (January 15, 1982 press release); PX 59 (January 26, 1982 press release).

In January 1982, Ametek, Inc. disclosed to the Securities and Exchange Commission ("SEC") that it had purchased about 10

percent of Robertshaw's stock and that it planned to purchase more, including the Robertshaw stock held by Reynolds Metals. *See* PX 54 (SEC Schedule 13D dated January 22, 1982). Thomas and the other members of the SSC were concerned that Ametek would attempt a "two-step" takeover of Robertshaw,[2] threatening Robertshaw's independence. Tr. A34-A36, C39-C40. Robertshaw therefore filed suit against Ametek, alleging violations of the federal securities laws and seeking to enjoin further purchases by Ametek of Robertshaw stock, including stock held by Reynolds Metals. Tr. B163-B165, C39-C40; *see* PX 64 (complaint filed January 27, 1982).

B. *The Severance Agreement*

In February 1982, the Robertshaw board of directors approved a severance agreement to be offered to Robertshaw's top executives.[3] Tr. B62; PX 86 (minutes of February 24, 1982 board

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[2] A two-step tender offer differs from a traditional tender offer. In a two-step transaction,

> the acquirer makes an initial partial offer for a control percentage of the target's stock at a set cash price, while simultaneously proposing a second step, usually a merger, in which securities of the acquirer will be exchanged for the remainder of the target's stock. The second-step securities-for-stock exchange will usually be valued at a price equal to or lower than the first-step cash price. The transaction is "front-end loaded" when the second step has a value lower than the first step.

1 A. Fleischer, *Tender Offers: Defenses, Responses, and Planning* 354-55 (1983) (footnotes omitted). The members of the SSC believed that a two-step tender offer would not be in the best interests of Robertshaw's shareholders, especially those relegated to the back end of a front-end loaded transaction. *See* Tr. A35-A37, B140-B141.

[3] Severance agreements, or "golden parachutes," essentially provide financial security for management upon a change of control. The agreements are designed to protect against risks, such as unsolicited takeovers, over which management has no control. "Moreover, these contract provisions may help attract, and retain, high level employees, and may lend greater objectivity to decisions made during consideration of a hostile tender offer." 1 A. Fleischer, *supra* note 2, at 88-89.

meeting). Diamond signed his severance agreement on February 24, 1982. Tr. B62; PX 83 (severance agreement). The agreement provides that Robertshaw "will promptly pay you upon your request as termination compensation a lump sum amount . . . in the event that within three years after a Change of Control of the Company (as hereafter defined), your employment with the Company is terminated involuntarily . . . ." PX 83, at 2. In defining "Change of Control," the agreement provides:

> For the purpose of this agreement, a "Change of Control" shall *include* (i) the acquisition of a total of 30% or more of the outstanding shares of the Company's common stock by an entity, person or group other than the Company pursuant to a tender or exchange offer or otherwise or series of related transactions, or (ii) the election, either directly or indirectly, of more than one-third of the Company's Board of Directors by any entity, person or group (except Reynolds Metals Company or a wholly owned subsidiary). Notwithstanding the foregoing, the acquisition of shares of common stock by Reynolds Metals Company, or a wholly owned subsidiary, acting on its own behalf shall not constitute a "Change of Control."

Id. at 3 (emphasis added).[4]

C. *The Alleged "Change of Control"*

Plaintiff's case hinges on whether, in the three years preceding his departure from Robertshaw in November 1983, Reynolds

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[4] At trial, Robertshaw was conditionally permitted to introduce, over plaintiff's objection, parol evidence relating to the definition of "Change of Control" in the severance agreement. *See* Tr. B51-B62, B92-B97, B152, B154-B158, B162-B163; PX 22; PX 41; PX 48; PX 61; Defendant's Trial Exhibit ("DX") 5. This evidence suggests that the drafters of the agreement, despite their choice of words, were concerned only with changes of control arising out of the acquisition of stock or the election of directors. The Court concludes, however, that the parol evidence rule bars consideration of the proffered evidence for this purpose. *See infra* at [A23].

Metals gained control over Robertshaw by some means other than the acquisition of stock or the election of directors. More specifically, plaintiff contends that Reynolds Metals, seeking to advance a purported plan to acquire Robertshaw, usurped the authority to direct Robertshaw's responses to possible takeover attempts. The following recital comprises the Court's findings of fact with respect to the alleged change of control.

1. *Robertshaw and Ametek Agree to Standstill; Exclude Reynolds Metals' Holdings*

On March 23, 1982, Robertshaw and Ametek executed a "standstill" agreement providing that Ametek would for a two-year period not seek to acquire any additional Robertshaw stock, "[e]xcept for the acquisition or attempted acquisition of shares of common stock of Robertshaw owned by Reynolds Metals Company." PX 85, ¶ 1. The agreement would terminate if, during the standstill period, Ametek acquired all or substantially all of the Robertshaw stock held by Reynolds Metals. *Id.* ¶ 4. In return for the standstill, Robertshaw agreed that its suit against Ametek would be dismissed with prejudice. *Id.* at ¶ 6.

Thomas, as president and chief executive officer, signed the standstill agreement on Robertshaw's behalf. Although the Robertshaw board of directors did not give prior approval to the agreement, Tr. A45, it was later ratified by the board. Tr. A46-A49; PX 91 (minutes of April 14, 1982 board meeting). The record does not make entirely clear who was involved in negotiating the standstill agreement. Thomas testified that Howell and Diamond, as members of the SSC, "pursued" an agreement with Ametek; Lipton's law firm was "advising" Howell and Diamond. Tr. B164-B165, C41. Diamond, however, testified that he played no part in the negotiations. Tr. A44-A46. Howell's deposition testimony indicates that William S. Leonhardt, chief financial officer and vice chairman of the board of Reynolds Metals and a member of Robertshaw's board, "participated in the negotiations as a representative of Reynolds Metals Company to the extent that Ametek insisted that it be allowed to continue to negotiate with Reynolds Metals Company

for the Reynolds block." Howell Deposition 141-42; *see* Tr. C41-C42.

On the basis of the foregoing testimony, the Court finds that Robertshaw's retained counsel and Howell negotiated the Ametek standstill agreement on behalf of Robertshaw, and that Leonhardt's participation in the negotiations was limited to the exclusion from the agreement of stock held by Reynolds Metals. Moreover, the Court credits Thomas' unrebutted testimony that the exclusion of Reynolds Metals' holdings was necessary to secure Ametek's assent to the standstill. Tr. B164.

Following the execution of the standstill agreement, Thomas sought and received assurances from Reynolds Metals that it would not sell its block of Robertshaw stock to Ametek. Tr. B166-B167; C40. Thomas at this time learned that Reynolds Metals intended instead to attempt to purchase the Ametek block. Tr. B166, C17-C18. He testified that he "was hopeful that Reynolds Metals Company would buy the Ametek stock, which meant that our company would then be operated just like it had been operated since its founding in 1948." Tr. B168.

2. *Reynolds Metals' Leonhardt Threatens Two-Step Tender Offer; Thomas Unalarmed*

Leonhardt served both as vice chairman of the board of Reynolds Metals and as a member of Robertshaw's board. Tr. A16. In a December 14, 1982 conversation with Howell, Leonhardt said: "I would like to acquire 51 percent of Robertshaw stock and tender for the rest." Howell Deposition 16. Howell testified that this "was not a serious conversation." *Id.* at 17. Nevertheless, Howell reported Leonhardt's statement two days later to Thomas and the SSC.[5] Tr. C15-C16; Howell Deposition 19-20. Thomas recognized that Leonhardt was in effect expressing his desire to attempt a two-step takeover of Robertshaw. Tr.

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[5] Leonhardt apparently had made a similar statement to Howell and Diamond in or about June 1982. Tr. A55-A58. The record does not make clear whether Howell reported this statement, the December 1982 statement, or both to Thomas on December 16, 1982. *See* Tr. C15-C16.

C16. He told the SSC that Leonhardt had similarly stated to him that Leonhardt wanted Reynolds Metals to acquire Robertshaw in a two-step transaction. Tr. A65-A67; PX 98 (Howell's notes of December 16, 1982 SSC meeting). Thomas did not report Leonhardt's statements to the Robertshaw board. Tr. C25-C26; Thomas Deposition 45-46.

In early 1983, Reynolds Metals began to purchase small amounts of Robertshaw stock, mainly in open market transactions. PX 162 (SEC Form 4's filed by Reynolds Metals). According to Diamond's testimony, Reynolds Metals had never before that time enlarged its holdings of Robertshaw stock through share purchases. Tr. A85. Although Thomas knew of the purchases, he testified that he did not recall reporting them to the Robertshaw board. Tr. C89; *see* Tr. A53.

At trial, Thomas explained that Leonhardt had advocated diversification for Reynolds Metals, but that he had been opposed by Reynolds Metals' chairman and at least two members of its board of directors. Tr. B142, B198-B199. Apparently, Thomas assumed that Leonhardt's comments about a two-step takeover of Robertshaw arose from Leonhardt's own desire for diversification, and did not represent the policy of Reynolds Metals' board.[6] *See* Tr. B198; Thomas Deposition 46-47. The Court credits Thomas' testimony, which is uncontradicted, concerning his reasons for not responding to Leonhardt's takeover threats.[7]

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[6] A Reynolds Metals document dated January 29, 1982, but otherwise unidentified, states that Reynolds Metals planned to acquire 49 percent of the outstanding shares of Robertshaw. PX 70; *see* Tr. A60-A61. Because plaintiff has not rebutted Thomas' testimony that he knew neither of the document nor of any plan by Reynolds Metals to acquire 49 percent of Robertshaw, *see* Tr. C19-C22, the Court need not determine whether such a plan in fact existed.

[7] Although hindsight is not particularly probative of the circumstances surrounding the earlier decision, the sale in 1986 of all the Robertshaw stock held by Reynolds Metals, which eliminated the possibility of a Reynolds Metals takeover, suggests that Thomas' judgment in 1982-83 was both reasonable and correct. *See* Tr. B214-B219.

3. *By-Law Amendment on Director Nominations Proposed; Later Dropped From Agenda*

In February 1983, Robertshaw received a "To Our Clients" memorandum from Lipton's law firm, setting forth a model by-law that would regulate nominations of director candidates, in part by restricting shareholder nominations from the floor at election meetings. PX 104; *see* Tr. A94, B169. Howell and Diamond recommended to Thomas that the by-law amendment be placed on the agenda for the August 16, 1983 Robertshaw board meeting. Tr. A94-A96, C50-C51. An agenda was prepared that included the amendment proposal. PX 121, item 6. At or before the board meeting, however, the Reynolds Metals employees on the Robertshaw board — David P. Reynolds ("Reynolds"), chairman of the board and chief executive officer of Reynolds Metals and chairman of the board of Robertshaw; John E. Blomquist; and Leonhardt — objected to consideration of the by-law amendment. Tr. A97-A98, B169-B170. Thomas therefore requested that the matter be tabled. Tr. C52-C53.

According to Thomas' testimony, Reynolds was "embarrassed" at the meeting because he had not received a copy of the agenda in advance and was not aware of the proposal. Tr. B170-B171, C54-C55. One month later, however, Thomas reported to Robertshaw executives a conversation with Leonhardt in which Leonhardt stated that Reynolds Metals, as a Robertshaw shareholder, remained opposed to the nominations by-law amendment. Tr. A107-A116; *see* PX 124 (Howell's notes of September 16, 1983 staff meeting).

Thomas' handwritten draft agenda for the next board meeting, which was to be held in October 1983, included the by-law amendment that had been tabled at the August 1983 meeting. PX 127, item 5. The typewritten draft of the agenda also included the proposal. PX 127A, item 9. The amendment did not appear, however, as an item on the final version of the agenda. PX 128 (agenda for October 18, 1983 board meeting). At trial, Thomas explained that he withdrew the by-law proposal from the agenda because Leonhardt had stated "that there was no way that the Reynolds Directors would be in favor of

that by-law change because it was not in the best interests of all the stockholders. . . . [a]nd I chose not to put it on because it wasn't worth a big fight." Tr. C58; *see* Tr. C59-C60.

4. *Reynolds Demands Pre-Approval of Board Meeting Agendas*

Beginning in September 1983, Thomas submitted each board meeting agenda to David Reynolds, the chairman of Robertshaw's board, for his review before sending the agenda to the other directors.[8] Tr. A116-A117, B171-B172, C55, C66. The change in procedure occurred following a conversation in which Leonhardt told Thomas that Reynolds had been embarrassed at the August board meeting because he had not received a copy of the agenda in advance. Tr. B170-B171, C54-C55. Thereafter, Thomas testified,

> [t]he agenda would be prepared, with my suggestions and the other staff members' suggestions of things that had to be placed upon it. It would then be submitted to me, and I would approve it, and Mr. [Robert E.] Sweaney, the Secretary of the corporation, would take care of checking with Mr. David Reynolds.

Tr. B172; *see* Tr. C55. Thomas reported the new agenda procedure to Robertshaw executives. Tr. A107-A109; PX 124 (Howell's notes of September 16, 1983 staff meeting).

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[8] Robertshaw concedes that a change in the agenda-setting practice occurred in September 1983. Reynolds Metals' Supplementary Answer to Interrogatory No. 3, which was admitted into evidence at trial without objection, states:

> Prior to September 1983, agendas were routinely sent to the Board of Directors of Robertshaw Controls Corporation (Robertshaw) without Reynolds' prior review. On or about September 1983 Reynolds requested that in his capacity as Chairman of Robertshaw's Board of Directors he be given the opportunity to review agendas in advance of their submission to the Robertshaw Board. Since that time Reynolds has reviewed and continues to review agendas.

Tr. A117.

Thomas asserted at his deposition that he was not required to submit board meeting agendas to Reynolds for approval, but instead did so "out of courtesy." Thomas Deposition 131-32. The Court, however, credits Diamond's lengthy trial testimony indicating Thomas was given no choice except to comply with Reynolds' wishes.[9] Tr. A110-A116. At trial, Thomas did not contradict Diamond's characterization of the events leading to the change in the agenda procedure. *See* Tr. B170-B172, C54-C55.

5. *Thomas Thwarts Proposed "Fair Price" Charter Amendment*

In December 1982, Robertshaw received a "To Our Clients" memorandum from Lipton's law firm,[10] recommending that corporations consider protecting against two-step tender offers by amending their charters to include a requirement that the second step in a hostile takeover be for cash at the same price as the first step.[11] PX 96; *see* Tr. A121-A123. Such a "fair price" amendment was discussed among members of the SSC. Tr. A123-A124, B172, C69. Thomas did not, however, attempt to bring the issue before the Robertshaw board of directors. Tr. A123, C74.

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[9] Diamond testified that he objected strongly to the new practice, but that Thomas rejected his arguments. Tr. A113-A115.

[10] As with Lipton's memorandum concerning a director nominations by-law, there is no indication that the December 1982 memorandum was directed to any individual Lipton client or to Robertshaw in particular. *See* Tr. A122-A123, B172, C68. This is also true of Lipton's subsequent memoranda of January, May, and June 1983. *See* PX 100; PX 112; PX 116.

[11] Such a "fair price" amendment assures a target's shareholders that if they choose not to tender their stock pursuant to the offer they will not be "frozen out" at a reduced price in a second-step merger, and is designed to relieve the pressure on shareholders to tender. 1 A. Fleischer, *supra* note 2, at 32. Although Diamond testified that Dillon, Read – Robertshaw's investment banker – also recommended adoption of a fair price amendment, Tr. A122-A123, Thomas could recall no such discussion. Tr. C70.

The parties offer competing explanations for Thomas' failure to promote a fair price amendment. According to Diamond's testimony, Thomas told Diamond that David Reynolds would not permit a proposal for a fair price amendment to come before the board. Tr. A124. Moreover, Diamond testified, Thomas said that such a proposal would not be adopted in any event without the support of the three directors from Reynolds Metals. Tr. A125.

Thomas testified, on the other hand, that he believed a fair price amendment to be unsound policy: "I objected to it because I thought it would set a price on the company, and I didn't feel that anybody in our whole corporation had any idea what the real value of Robertshaw was." Tr. B173. He further explained that "[t]he fair price amendment would mean that whatever was paid to the first tender was also paid to the second tender, the second group. And that may not be the right price." Tr. C72. Thomas estimated Robertshaw's per-share value at this time to be at least $60, well in excess of the stock's market price. Tr. B173-B174.

The Court does not reach the merits of Thomas' argument against a fair price amendment. On the basis of the foregoing testimony, and especially in light of Thomas' demeanor on the stand, I am satisfied his opposition was sincerely held. I therefore find Thomas' belief that a fair price amendment was not in the shareholders' best interests was the primary, if not the only, reason he chose not to put the issue before the Robertshaw board.

6. *Robertshaw and Dillon, Read Arrange Incentive Fee; Exclude Deal With Reynolds Metals*

One of Robertshaw's responses in 1980 to the possibility of a takeover attempt was the retention of the investment banking firm of Dillon, Read & Co.[12] Tr. A20, B45, B144. Thomas negotiated the fee arrangement with Dillon, Read. Tr. B179;

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[12] Dillon, Read had been Robertshaw's investment banker well before 1980. Tr. C82. Apparently, however, the firm was not specifically retained until 1980, following the period of unusual activity in the trading of Robertshaw stock. Tr. B45.

Thomas Deposition 96. The arrangement provided that Dillon, Read would receive, in addition to a flat fee for keeping a current evaluation of Robertshaw's worth, a percentage of the amount received by Robertshaw's shareholders in the event of a takeover of Robertshaw. Tr. B180, C76, C80-C81. The purpose of the arrangement was to give Dillon, Read an incentive to obtain the most favorable terms for Robertshaw's shareholders; for example, the investment banker could attempt to locate a friendly acquiror, or "white knight,"[13] willing to pay a high price for the Robertshaw stock. Tr. C76-C81.

The incentive fee arrangement, however, did not apply if Reynolds Metals successfully acquired Robertshaw. Tr. B180, C77. Thomas' testimony on the reasons he negotiated this exclusion is somewhat cryptic. He asserted that if Reynolds Metals was the acquiror, Dillon, Read "would not be involved in doing any work for the shareholders." Tr. B180. On cross examination, Thomas explained that the investment banker "would not, in my opinion, have been doing the job that an investment banker is really hired to do, if Reynolds Metals Company was involved in some type of a takeover, and owning 31 percent of the shares." Tr. C78. He acknowledged that the fee arrangement provided Dillon, Read with no incentive to obtain a high price from Reynolds Metals, but noted that "[i]t would certainly make them work like crazy to find somebody else to get a bigger price." Tr. C81.

The Court understands the foregoing testimony to mean that Thomas regarded Reynolds Metals, by virtue of its large existing block of Robertshaw stock, as a relatively obvious and easily available white knight in the event of a takeover attempt by a third party. If, on the other hand, Reynolds Metals made a tender

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[13] In the event of a tender offer, the target corporation's investment banker may seek either to negotiate a better deal with the bidder or to arrange a friendly combination with a white knight. The investment banker, in attempting to obtain a white knight, must evaluate the nature of the target's business, its historical record, its future outlook, and the quality of its management, as well as determine the time necessary to find and consummate a deal. 1 A. Fleischer, *supra* note 2, at 321-23.

offer, the fee arrangement Thomas negotiated would give Dillon, Read an incentive to locate a third party willing to pay a higher price than the price offered by Reynolds Metals. The Court credits Thomas' statement that Reynolds Metals was uninvolved in setting Robertshaw's fee arrangement with Dillon, Read. *See* Tr. B180.

7. *Robertshaw Searches for "White Knight"; Thomas Not Enthusiastic*

During the term of the Ametek standstill agreement, members of the SSC prepared several lists of potential white knights. Tr. A128-A129; *see* PX 27; PX 28; PX 34; PX 103. The SSC regarded the Raytheon Company as an especially attractive alternative. Tr. A130, B182. On August 9, 1983, Thomas met with executives of Raytheon. Tr. A134, B183. Thomas testified he understood from the meeting that Raytheon was reluctant to acquire any Robertshaw stock as a white knight unless Reynolds Metals offered its block of Robertshaw stock to Raytheon as well. Tr. B184, B187.

Later that day, Thomas reported to the SSC. Tr. A137-A138. According to Howell's notes, Thomas indicated that he expected "[n]o speedy response" from Raytheon regarding its willingness to act as a white knight. PX 120 (Howell's notes of August 9, 1983 SSC meeting). Nevertheless, Thomas stated that " 'the interest is still there.' " *Id.* Although Thomas noted that Raytheon would not make an uninvited offer to Reynolds Metals for its Robertshaw stock, he said he assured Raytheon that Reynolds Metals would not ignore a bid of $60 per share.[14] *Id.* In this connection, Thomas indicated that he would send Raytheon a "care package" containing data on Robertshaw. *Id.*; *see* Tr. A139-A140.

Thomas did not send the Robertshaw data to Raytheon, Tr. A140, nor did he meet with other potential white knights. Tr. B188-B189, C85; Thomas Deposition 79-80. Again, the parties offer competing explanations for Thomas' failure to act. According to Diamond's testimony, Thomas stopped pursuing white

[14] Thomas' suggested bid price was well in excess of the stock's market price at that time. *See* Tr. B173-B174.

knights in order to facilitate Reynolds Metals' purchase of Ametek's block of Robertshaw stock.[15] Tr. A147-A148. The Court, however, credits Thomas' testimony, which is not inconsistent with Howell's notes of the August 9, 1983 SSC meeting, that Raytheon and other potential white knights would be reluctant to acquire stock in Robertshaw without being assured that Reynolds Metals' holdings were also available. *See* Tr. B184, B187. Thomas, aware that Reynolds Metals was uninterested in selling its Robertshaw stock, Tr. B185-B186, believed further pursuit of a white knight (other than Reynolds Metals) would be futile.[16]

8. *Reynolds Snubs Questioner at Shareholder Meeting; Minutes Silent*

David Reynolds, as chairman of Robertshaw's board of directors, presided at the April 13, 1983 annual meeting of Robertshaw's shareholders. Tr. A149. Mr. George Shipp of the Investment Corporation of Virginia, which was a shareholder of Robertshaw, was present at the meeting.[17] Tr. A150. When Reynolds asked for questions from the floor, Shipp inquired about Reynolds Metals' plans with respect to its investment in Robertshaw. Tr. A151, B193. Reynolds ruled the question out of order, and refused to answer. Tr. A151, B193. Robert E. Sweaney, Robertshaw's corporate secretary, apparently was instructed not to record the question in the minutes of the annual meeting. Tr. A155-A156; Sweaney Deposition 37; *see* PX 111 (minutes of April 13, 1983 annual meeting).

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[15] Thomas delayed meeting with TRW, another white knight candidate, pending a meeting between Reynolds Metals' Leonhardt and Ametek executives. PX 124 (Howell's notes of September 16, 1983 staff meeting).

[16] Later events suggest that Thomas' belief was both reasonable and correct. In 1986, when Reynolds Metals' block of Robertshaw stock was offered for sale along with the rest of Robertshaw, Raytheon was among 51 interested purchasers. Tr. B187.

[17] Shipp had prepared a December 21, 1982 report analyzing Robertshaw's business and recommending the purchase of shares in the company. *See* PX 99.

Thomas testified that Shipp's question was inappropriate at a Robertshaw shareholder meeting because it concerned the business plans of Reynolds Metals, not Robertshaw. Tr. B194. He agreed that the question should have been neither answered nor recorded in the minutes. Tr. B193. The Court credits Thomas' explanation of the incident.

9. *Reynolds Metals Buys Ametek Block: "If That's the Good News, What's the Bad News?"*

At an October 25, 1983 Robertshaw staff meeting, Thomas reported that Reynolds Metals had acquired Ametek's 10 percent block of Robertshaw's stock,[18] which he characterized as "good news." Tr. A158, B195-196. Thomas told the meeting that the threat of a takeover was ended and that Robertshaw could once again concentrate on growth and profits. Tr. A158, B197; Howell Deposition 58. Diamond responded with a phrase that has become famous, at least in the context of this case: "If that's the good news, what's the bad news?" Tr. A158, B196; Howell Deposition 58. According to Diamond's testimony, he told Thomas that Reynolds Metals' purchase of the Ametek block made more likely an attempt by Reynolds Metals to acquire Robertshaw in a two-step takeover. Tr. A158-A159. Thomas did not recall such a discussion. Tr. B197-B198.

10. *Diamond Given Walking Papers*

On November 15, 1983, Thomas summoned Diamond to his office and asked for his resignation as an officer and director of Robertshaw. Tr. B5-B6, B201. Thomas testified that because Reynolds Metals' purchase of the Ametek block had ended the

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[18] In the fall of 1983, the Reynolds Metals board of directors, on which Thomas served, approved a banking resolution authorizing Leonhardt to purchase common stock valued at $20 million. Tr. A81. There is no evidence that the name of the corporation whose stock was to be purchased was revealed to the Reynolds Metals board. The Court therefore credits Thomas' testimony that he was unaware until October 25, 1983 that Reynolds Metals would purchase the Ametek block. *See* Tr. B195, C16-C17.

threat of a takeover, Robertshaw no longer needed Diamond's services. Tr. B199-B200. According to Thomas, about 50 percent of Diamond's time in 1983 had been devoted to SSC matters. Tr. B200.

D. *The Termination Agreement*

Thomas and Diamond executed a termination agreement dated November 18, 1983. *See* PX 136. The agreement provided that Diamond would resign as an officer and director of Robertshaw. *Id.* at 1. In addition to continuing Diamond's base salary through 1984, it provided for continued insurance benefits, a 1983 executive bonus, secretarial services, use of a company car, and payment for executive placement services. *Id.* The agreement, however, contained the following requirements:

> As long as your salary continues, though, you will not accept employment with a competitor, direct or indirect, of Robertshaw nor will you compete with Robertshaw, directly or indirectly, as an individual, in a partnership or in any other manner. You will not remove or retain any Robertshaw data or files and will return any data or files which you may have in your personal possession. You will also clear any travel advances or other indebtedness to the company and submit all outstanding expense reports by November 30.

Id. at 1-2.[19] The parties have stipulated that Robertshaw paid Diamond's salary until June 1984 and that Diamond received his 1983 executive bonus. Pretrial Order, Docket Item 121, ¶¶ 3(9)-3(12).

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[19] At trial, Robertshaw was conditionally permitted to introduce, over plaintiff's objection, prior drafts of the termination agreement suggesting that Diamond did not seek to change the relevant terms of the agreement during negotiations with Thomas. DX 6; DX 7; DX 8; *see* Tr. B70-B73; B207-B210. Because the termination agreement is clear and unambiguous, however, the proffered evidence is not only unnecessary but also plainly barred by the parol evidence rule.

Some time after his departure from Robertshaw, Diamond returned to his former office and removed numerous documents and files. Tr. B20-B22. Diamond testified that Ms. Louise Cantrell, his former secretary, told him that the materials from his office had been packed into cartons and that he was expected to remove them. Tr. B20. Diamond brought the cartons to his apartment, and in June 1984, moved them to New York. Tr. B21, C169-C170. In the meantime, on June 1, 1984, Robertshaw ceased all benefits to Diamond under the termination agreement. Tr. B30; PX 150 (Howell letter of June 8, 1984).

According to Diamond's testimony, he did not look through the cartons of materials before filing the instant lawsuit in May 1984. Tr. B80-B81, C170. He apparently did not review the contents of the cartons until he received notice of a June 21-22, 1984 deposition at which he was requested to produce documents referring to Robertshaw or to any of the other original defendants in the case.[20] Tr. B79-B80, C170-C171. At his deposition, Diamond produced over 2,500 pages of documents, including copies of minutes of Robertshaw board meetings, SSC materials, and various financial materials. *See* Diamond Deposition 233-39. Although neither party presented adequate evidence concerning the reasons Diamond removed the documents or his knowledge of their contents, the Court must credit Diamond's foregoing testimony, which defendant has not rebutted.

Diamond also retained Robertshaw documents that he had removed before his departure from the company. In particular, he kept copies of cancelled checks representing payments Robertshaw had made to some of its customers as part of a price discount program. Tr. C161. Diamond testified that he had been advised to check the endorsements on these checks to prevent fraud, and that he retained copies in the event he needed to prove his diligence. Tr. C164-C167.

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[20] *See supra* note 1 (claims against original defendants).

II. CONCLUSIONS OF LAW

A. *The Severance Agreement*

The parties offer differing interpretations of the language of the February 24, 1982 severance agreement defining "Change of Control." *See* PX 83. The agreement provides that a change of control shall "include" the acquisition by an outside entity of 30 percent or more of Robertshaw's stock or the election by an outside entity of one third or more of Robertshaw's board of directors. *Id.* at 3. A change of control is expressly deemed not to occur if Reynolds Metals acquires stock or elects directors. *Id.* Defendant argues that the acquisition of stock and the election of directors are the only events that may constitute a change of control under the agreement.[21] Plaintiff argues that a change of control under the agreement occurs whenever an outside entity gains the power to direct Robertshaw's management or policies, and is not limited to the acquisition of stock and the election of directors. Because Reynolds Metals is not expressly excluded from changes of control other than through stock acquisition and director election, the argument goes, if Reynolds Metals gained control of another kind within three years before plaintiff's termination, plaintiff is entitled to benefits under the severance agreement.

Plaintiff relies on the language of the severance agreement in arguing that it does not purport to set forth all conditions under which a change of control may occur. Specifically, in defining various terms, the agreement provides that "[f]or

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[21] Defendant also argues that Diamond's negotiated termination agreement, providing that Diamond would on November 18, 1983 "resign" as an officer and director of Robertshaw, PX 136, at 1, precludes him from claiming he was "terminated involuntarily" as the severance agreement requires. PX 83, at 2. This argument need not detain the Court. Defendant has expressly stipulated that Diamond was "forced to resign," Pretrial Order, Docket Item 121, ¶ 3(6); Thomas testified that Diamond was given no choice but to leave Robertshaw. Thomas Deposition 170-71. The Court finds that Diamond was involuntarily terminated for purposes of the severance agreement.

purposes of this agreement 'Normal Retirement Date' shall *mean* . . ." and that "[f]or purposes of this agreement, 'Good Reason' shall *mean* . . ." but that "[f]or purposes of this agreement, a 'Change of Control' shall *include* . . . ." PX 83, at 3 (emphasis added). Plaintiff contends the use of "include" instead of "mean" signifies an intent not to limit a change of control to the acquisition of stock or the election of directors.

The Court agrees that "include" in the context of the severance agreement is a word of enlargement rather than one of limitation. *See Sims* v. *Moore*, 244 So. 2d 484, 487 (Ala. 1972); *Pottsburg Utilities* v. *Daugharty*, 309 So. 2d 199, 202 (Fla. App. 1975); *Schwab* v. *Ariyoshi*, 564 P.2d 135, 141 (Haw. 1977); *Lucke* v. *Lucke*, 300 N.W.2d 231, 234 (N.D. 1980). Therefore, stock acquisition and director election are simply two illustrations of a change of control, and do not exhaust the possibilities. At trial, Robertshaw was conditionally permitted to introduce, over plaintiff's objection, evidence tending to show that the drafters of the agreement, despite their choice of words, were concerned only with changes of control resulting from the acquisition of stock or the election of directors. *See* Tr. B51-B62, B92-B97, B152, B154-B158, B162-B163; PX 22; PX 41; PX 48; PX 61; Defendant's Trial Exhibit ("DX") 5. Because the meaning of "include" is unambiguous, however, the Court holds that the Virginia parol evidence rule bars consideration of the proffered evidence for this purpose.[22] *See Hechler Chevrolet* v. *General Motors Corp.*, 337 S.E.2d 744, 749 (Va. 1985); *Renner Plumbing, Heating & Air Conditioning* v. *Renner*, 303 S.E.2d 894, 898 (Va. 1983); *Berry* v. *Klinger*, 300 S.E.2d 792, 796 (Va. 1983). Plaintiff may therefore attempt to show that Reynolds Metals gained control of another kind over Robertshaw within three years before plaintiff's termination.

B. *The Alleged "Change of Control"*

The pivotal question in this case is whether, in the three years preceding plaintiff's termination, Reynolds Metals gained control

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[22] The parties agree that the substantive law of Virginia governs the breach of contract claims in Counts Five and Eight of the second amended complaint and in defendant's counterclaim. *See* Pretrial Order, Docket Item 121.

over Robertshaw by some means other than the acquisition of stock or the election of directors. The SEC's definition of "control," useful here by way of analogy, is "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." 17 C.F.R. § 230.405 (1987) (registration requirements under Securities Act of 1933); *id.* § 240.12b-2 (registration and reporting requirements under Securities Exchange Act of 1934). Generally, the meaning of control under the federal securities laws "is no different than it is in normal everyday usage." *United States* v. *Re*, 336 F.2d 306 (2d Cir.), *cert. denied*, 379 U.S. 904 (1964).

Simply stated, plaintiff's theory of the facts is that Reynolds Metals, seeking to advance its plan to acquire Robertshaw in a two-step merger, gained the power to direct Robertshaw's responses to possible takeover attempts.[23] Plaintiff stresses the control allegedly exercised by Reynolds Metals over the Robertshaw board's agenda-setting process. According to plaintiff, David Reynolds' power to review board meeting agendas permitted Reynolds Metals, directly or indirectly, to suppress proposals for defensive measures such as the director nominations by-law amendment and the "fair price" charter amendment.

The Court, however, believes plaintiff's reliance on Reynolds Metals' purported agenda control to be misplaced. Nothing about Reynolds' insistence on prior approval of board meeting agendas is inconsistent with his responsibilities and prerogatives as chairman of Robertshaw's board. Although plaintiff asserts that Reynolds exceeded his authority as chairman by manipulating the agenda to further the goals of Reynolds Metals, there is no persuasive evidence that he in fact did so. First, the Reynolds Metals directors may have forced Thomas to drop the proposed by-law amendment restricting shareholder nominations of directors from the floor at election meetings. Reynolds

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[23] In light of plaintiff's theory, the Court finds that the Ametek standstill agreement is irrelevant to the change of control issue. Plaintiff alleges the agreement was designed to facilitate the sale – rather than the purchase – of Robertshaw stock by Reynolds Metals.

Metals, however, already possessed the power to nominate directors by virtue of its membership on the Robertshaw board, and had no need to rely on the floor. It is therefore very difficult to understand how as a result of the by-law amendment's defeat the interests of Reynolds Metals were advanced at the expense of other Robertshaw shareholders. Second, Thomas may have failed to promote a fair price amendment to Robertshaw's charter in the face of expected opposition from the Reynolds Metals directors. The Court is persuaded, however, that Thomas himself sincerely believed the proposal to be contrary to the shareholders' best interests.

Each of the other episodes described by plaintiff may similarly be reconciled with the proper exercise by Robertshaw's management of its own discretion. For example, Thomas chose not to respond to Leonhardt's comments about a two-step takeover of Robertshaw because Thomas assumed the threats arose from Leonhardt's own desire for diversification, not from the official policy of Reynolds Metals' board. The fee arrangement with Dillon, Read reflected Thomas' judgment that the investment banker should not have an incentive to obtain a high price from Reynolds Metals if Reynolds Metals successfully acquired Robertshaw. Nevertheless, the fee arrangement Thomas negotiated provided Dillon, Read with an incentive to locate a third party willing to pay a higher price than the price offered by Reynolds Metals. Finally, Thomas chose to abandon his pursuit of a white knight (other than Reynolds Metals) because he believed potential acquirors would be reluctant to purchase stock in Robertshaw in the absence of assurances that Reynolds Metals' holdings were also available.

In the last analysis, plaintiff has failed to persuade the Court that Reynolds Metals had a "plan" to acquire Robertshaw.[24]

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[24] The only direct evidence of a Reynolds Metals plan to acquire Robertshaw is a document, unfamiliar to Robertshaw's chief executive officer, stating that Reynolds Metals planned to purchase 49 percent of the outstanding shares of Robertshaw. PX 70; *see supra* note 6. The Court does not agree with plaintiff

(footnote continued)

A more reasonable characterization of the facts assembled at trial is that Ametek, not Reynolds Metals, posed the only genuine takeover threat. The Court is convinced that Robertshaw's managers sincerely relied on the years of fruitful co-existence between their company and Reynolds Metals — first, to encourage Reynolds Metals to purchase Ametek's block of Robertshaw stock, and second, to quiet any concerns that Reynolds Metals would use its increased holdings to attempt a takeover.[25] For the foregoing reasons, the Court finds that Reynolds Metals did not gain control over Robertshaw by some means other than the acquisition of stock or the election of directors.[26]

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that the failure to answer or record a question at the April 13, 1983 Robertshaw shareholder meeting concerning Reynolds Metals' intentions is circumstantial evidence of a Reynolds Metals plan. Moreover, the sale in 1986 of all the Robertshaw stock held by Reynolds Metals, which eliminated the possibility of a Reynolds Metals takeover, suggests that no earlier takeover plan existed. *See* Tr. B214-B219.

[25] Diamond testified throughout the trial that he was suspicious of and opposed to a possible Reynolds Metals takeover. In response to questioning by the Court, however, Diamond admitted — albeit circuitously — that he too might have viewed Reynolds Metals' purchase of the Ametek block as preferable to a purchase by Ametek of the Reynolds Metals block. Tr. B101-B112.

[26] In an apparent effort to salvage his case, plaintiff requests the Court to draw an inference that the testimony of Joseph Howell, had defendant called him as a witness, would have been adverse to Robertshaw. The "missing witness" inference operates where a potential witness under one party's control does not testify; the other party is entitled to an inference that the testimony would have been unfavorable to the party controlling the witness. *McQuaig v. McCoy*, 806 F.2d 1298, 1303 (5th Cir. 1987). If, however, the witness is equally available to both parties, the missing witness inference is impermissible. *Labit v. Santa Fe Marine*, 526 F.2d 961, 963 (5th Cir.), *cert. denied*, 429 U.S. 827 (1976). Howell was present in the courthouse throughout the trial, and there is no evidence of any personal hostility toward plaintiff. More importantly, plaintiff relied upon and introduced into evidence much of Howell's deposition; "the justification for the missing witness instruction diminishes with the availability of the tools of discovery." *Cameo Convalescent Center v. Senn*, 738 F.2d 836, 844 (7th Cir. 1984). The Court therefore declines to draw an inference from defendant's failure to call Howell as a witness.

C. *The Termination Agreement*

The November 18, 1983 termination agreement between Diamond and Robertshaw provided, among other things, "[y]ou will not remove or retain any Robertshaw data or files and will return any data or files which you may have in your personal possession." PX 136, at 1-2. Plaintiff claims that Robertshaw breached the termination agreement on June 1, 1984 in retaliation for the bringing of this lawsuit in May 1984. Robertshaw counterclaims that Diamond breached the agreement by removing Robertshaw documents and files after leaving the company and by retaining Robertshaw documents he had removed before his departure.

The Court concludes that Diamond's removal and retention of Robertshaw materials breached the express terms of the termination agreement. Nothing in the termination agreement suggests that Diamond was allowed to remove and retain copies as distinguished from original Robertshaw documents. Similarly, the agreement does not indicate that unintentional removal of company materials would be permissible.[27]

Whether Diamond's breach of the termination agreement was material, excusing Robertshaw from performance under the agreement, is less clear. *See R.G. Pope Constr. Co.* v. *Guard Rail of Roanoke*, 244 S.E.2d 744 (Va. 1978). In determining the materiality of a breach, the following factors are significant:

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
>
> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

---

[27] Diamond cannot, of course, claim that he unintentionally retained the copies of cancelled checks representing Robertshaw's payments under its price discount program. Whatever Diamond's reasons for retaining these documents, his actions were clearly impermissible under the termination agreement.

> (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
>
> (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;
>
> (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

Restatement (Second) of Contracts § 241 (1981). Diamond's actions plainly deprived Robertshaw of the benefit that it reasonably expected from the termination agreement. *See* E. Farnsworth, *Contracts* § 8.16 (1982). Moreover, Diamond has neither cured the breach nor offered evidence that he will suffer forfeiture as a result of the breach.

A finding of materiality, however, requires the Court to consider also whether Diamond's behavior comported with standards of good faith and fair dealing:

> A party's adherence to standards of good faith and fair dealing will not prevent his failure to perform a duty from amounting to a breach. . . . The extent to which the behavior of a party failing to perform or to offer to perform comports with standards of good faith and fair dealing is, however, a significant circumstance in determining whether the failure is material. In giving weight to this factor courts have often used such less precise terms as "willful."

Restatement, *supra*, § 241 comment f (citations omitted). Diamond's actions with respect to the cartons of documents he removed after his departure from Robertshaw cannot be called willful or intentional. *See Jacob & Youngs* v. *Kent*, 129 N.E. 889 (N.Y. 1921) (Cardozo, J.). The Court finds that the removal of the cartons, by itself, did not amount to a material breach of the termination agreement. Diamond's retention of copies of

cancelled checks representing payments under Robertshaw's price discount program, however, was indisputably willful and intentional. Therefore, considering all the facts and circumstances, the Court finds that Diamond's breach of the termination agreement was material.

Robertshaw was excused from performance under the termination agreement from the time it discovered Diamond's material breach. *See Restatement*, *supra*, § 237 & comment b; *R.G. Pope*, 244 S.E.2d at 778. In addition, Robertshaw has a claim for damages for breach, which in this case is for the payments made to Diamond until June 1984 in reliance on the agreement. *See Restatement*, *supra*, § 243; E. Farnsworth, *supra*, § 12.16.

For the foregoing reasons, the Court will enter judgment against plaintiff on Counts Five and Eight of the second amended complaint, and will enter judgment for defendant on its counterclaim in the amount of $72,900.

Supreme Court, U.S.
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CLERK

No. 88-486

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1988

PATRICK H. DIAMOND,

Petitioner,

v.

DAVID P. REYNOLDS,
REYNOLDS METALS COMPANY,

Respondents

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. RESPONDENT'S BRIEF SHOULD BE STRICKEN

The Court should strike the brief of the respondents, David P. Reynolds & Reynolds Metals, because of its numerous deliberate and material false statements of fact & law.

The Respondents say on page 6 of their brief:

> "The Second Amended Complaint . . . specifically disavows any nexus between the alleged predicate acts and petitioner's injury."

That this statement is false can be seen from the complaint (Petition, Ap. C). Nowhere does the complaint "specifically disavow any nexus" but the respondents go on, throughout the remainder of their brief, to construct a skyscraper of argument on a foundation of falsity.

Similarly, Respondents put forth on page 5 a materially false and misleading

statement of law. In fn. 4, the respondents after correctly recognizing their "twelve purported separate mail fraud violations", and after correctly recognizing that "the predicate acts alleged pleaded violations of the mail fraud statute" proceed to quote from a case Biesenbach v. Guenther, 588 F.2d 400, 402 (3d Cir. 1978), as one of a "legion" of cases, "refusing to find fraudulent the allegation that the defendants perpetrated a material omission". The respondents would lead the Court to believe that this is relevant law, but never disclose that Biesenbach did not have a single allegation of a "mail fraud violation" in it (emphasis supplied).

Similarly, see p. 7 of this reply brief, as to their altering the meaning of a quotation by omitting words that

would show the Court was speaking of standing under an entirely different part of §1962.

Similarly, see p. 17 of this reply brief, the respondents' citation of 3 cases, Sperber, Flip Side and Grantham as all "acknowledging" a proposition not even discussed by those Courts of Appeal.

The Respondents' brief should be stricken for these materially false statements of fact and law because:

> "A court should not have to pore over an extensive record as an alternative to relying on counsel's representations." In re Boucher, 837 F.2d 869, 871, (9th Cir. 1988).

This Court should be able to rely on counsel's obedience to Rule 3.3 of the ABA Model Rules of Professional Conduct:

> "A lawyer shall not knowingly make a false statement of material fact or law to a tribunal."
>
> "[With] the dramatic rise in litigation . . . tolerance of

> lawyers' misconduct is simply a luxury the federal court system can no longer afford." Eash v. Riggins Trucking, Inc., 757 F.2d 557, 565 (3d Cir. 1985).

II. PETITIONER HAS STANDING BECAUSE OF INJURY BY PREDICATE ACTS OF MAIL FRAUD

The respondents are incorrect; Diamond's injury did flow from their predicate acts of mail fraud, i.e., their fraudulent mailings to Robertshaw stockholders.

The RICO conspirators knew that Diamond was a member of the Board of Directors of Robertshaw when they committed their predicate acts of mail fraud by mailing false proxy statements to the Robertshaw shareholders (Complaint ¶12Ai, Bi, ¶¶32-34, 39, 41, 43). These proxy statements contained Diamond's name, biography, and in large letters on the cover of each said that they were mailed "By Order of the Board of Directors".

When the director Diamond became aware that the respondents were engaged in a conspiracy to defraud his shareholders, and were using false proxy statements with his name on them to accomplish their scheme, he objected with the result that the RICO conspirators fired him. Thus, Diamond's firing was a direct result of, and flowed from, the predicate acts of mail fraud; he responded, and indeed had no choice but to respond, to the mail fraud they were carrying out in his name, to protect his reputation, to avoid liability for the mail fraud, and to safeguard his shareholders from the mail fraud. Diamond's injury is much more closely related to the RICO violations than the injury to any of the victims in the examples of Justice Marshall on page 521-522 of Sedima, which all nine

Justices agreed would have RICO standing, see Sedima, fn. 15.

The Third Circuit's idea that an employee who was asked to join a mail fraud conspiracy against his shareholders but refused and was fired might have standing but that an employee, known to the conspirators as an honest employee and therefore not asked to join, who opposed the plan and was fired would not have standing makes no sense. What reason in the statute, case law or public policy could support greater protection for a "shady" employee than for an honest one? Respondents' Brief, p. 8.

III. RESPONDENTS AND THE COURT BELOW WOULD READ §1962(d) OUT OF THE STATUTE

Respondents try to sidestep the careful analysis of §1962(d) in Williams v. Hall, 683 F.Supp. 639 (E.D. Ky. 1988) by saying that Williams "is primarily

concerned with standing to sue under 18 U.S.C. §1962(d)" and that Sedima said standing is conferred by "injury flowing 'from the commission of the predicate acts'". Respondents' Brief p. 13 fn. 5.

First: Petitioner's Complaint does claim standing under §1962(d) (Complaint, ¶65, 66)

Second: Respondents omit the underlined words from Sedima: "recoverable damages occurring by reason of a violation of §1962(c) will flow from the commission of the predicate acts" and take out of context what Sedima said about §1962(c) so that it seems that the quotation were about §1962(d). (This unprofessional course of conduct has been pointed out in Sect. I as another reason why the Court should strike respondents' brief.)

Third: As Williams points out at 642:

> "The court believes that the Supreme Court . . . would follow the common law of civil conspiracy in determining standing under §1962(d)."
>
> "(L)iability for civil conspiracy is geared to damage caused by commission of overt acts done in furtherance of the conspiracy." P. 643 (emphasis supplied).

Although respondents would read §1962(d) out of the statute, Diamond's allegations of injury by a RICO conspiracy in violation of §1962(d) provide separate grounds for standing. RICO is a carefully crafted statutory scheme; §1962(d) reflects the fear of groups working for illegal ends, and makes it a violation of §1962 to conspire to violate §§1962(a), (b) or (c). Section 1964 imposes a civil liability on violators of any section of §1962, including 1962(d).

But the only way in which there can be injury by a conspiracy is by injury by an overt act. It is not the conspiracy itself but the overt acts done to further the conspiracy which cause the injuries which give rise to civil liability. Rutkin v. Reinfeld, 229 F.2d 248, 252 (2d Cir.), cert denied sub nom. Kaplow v. Reinfeld, 352 U.S. 844 (1956).

Therefore, since §1964 grants standing to those injured by a violation of §1962(d), it grants standing to those injured by an overt act to further the conspiracy. Diamond was fired (an overt act) to further the 1962(d) conspiracy to violate 1962(b) and (c), was therefore injured in his business and property, and has standing to recover under §1964.

IV. DECISION BELOW CONFLICTS WITH SEDIMA

The Second Circuit in Sedima had allowed standing only if the plaintiff

could "allege a 'racketeering injury' -- an injury different in kind from that occurring as a result of the predicate acts themselves. . ." Sedima, 473 U.S. 479, at 485.

When the Supreme Court expanded standing to those who had been injured "as a result of the predicate acts themselves", it did not take way standing from those with a "racketeering injury" who had previously had standing. See Sedima, 497, fn. 15, which criticizes the Second Circuit for having been too sparing with standing:

> "Even the court below was not that grudging. It would have allowed recovery for both the direct and the ultimate harm flowing from the defendants' conduct, requiring injury 'not simply caused by the predicate acts but also caused by an activity which RICO was designed to deter'." (emphasis supplied)

The Second Circuit agrees that both

those with the original "racketeering injury" and those with the new, injury by the predicate acts, have RICO standing, Bankers Trust Co. v. Rhoades, No. 1074, Slip Op. Oct 3, 1988, p. 6605:

> "(A)ll that is required is that plaintiff suffer injury in fact, see Sedima, (the only standing requirement under §1964(c) is that the plaintiff be 'injured . . . by the conduct constituting the violation')."
>
> "Significantly, this injury is not limited to damages suffered from the RICO violation as a whole, but also includes injuries suffered from each predicate act." (emphasis supplied)

The "damages suffered from the RICO violation as a whole" are the original "racketeering injuries". Sperber v. Boesky, 849 F.2d 60, 63 (2d Cir. 1988):

> "By damages caused only 'indirectly', we mean 'racketeering' injury, 'competitive' injury or injury caused by the total effect of the pattern of racketeering in the enterprise."

> "The [Sedima] majority evidently agreed that at least some kinds of indirect injury are recoverable since they stated that 'damages include, but are not limited to, the sort of competitive injury for which the dissenters allow recovery. [Sedima, fn. 15] Sperber at 63.
>
> "We therefore assume, without so holding, that all of Justice Marshall's plaintiffs [Sedima, p. 521-522] can recover." Sperber at 64.

"Indirect injury" means "racketeering injury" or "competitive injury", not indirect injury by the predicate acts as the respondents seem to think.

Respondents Don't Respond To Sedima Fn.15

Although the petition cites often Sedima, p. 521-522, and fn. 15, the respondents nowhere "respond". The Petition points out at least ten times that the clear language of Sedima, at 497, fn. 15, grants standing to those

with direct injury but doesn't take it away from those who had always had it, i.e., those with "racketeering", "competitive" or "indirect" injuries.

> "Such damages include, but are not limited to, the sort of competitive injury for which dissenters would allow recovery. See post, at 521-522." Sedima, p. 497.

This language, and indeed the rest of fn. 15, points out very clearly that RICO covers injuries "caused by an activity which RICO was designed to deter", i.e., "competitive injury", "racketeering injury" and "indirect injury".

Respondents never once were able to answer the clear language of fn. 15 of Sedima, although the petition cited and quoted it numerous times:

> P. 26 and p. 43: "'The Majority . . . agreed indirect injury (is) recoverable since . . . "damages include, but are not limited to, the sort of

competitive injury for which the dissenters allow recovery"' (fn. 15)"

P. 29: "'(T)he injurious consequences of the enterprise other than the injury directly attributable to the fraudulent acts themselves would be recoverable. See (fn. 15)"

P. 30: "'Sedima, (fn. 15) presumably . . . include(s) the "racketeering injury" concept adopted by the Second Circuit.'"

P. 40: "That the . . . decision conflicts with Sedima can be seen from . . . (fn. 15)"

P.43: "(A)ll nine justices agreed . . . 'racketeering injury', 'indirect injury', or 'competitive injury' . . . would continue to have standing, (fn. 15)".

P. 44: "Sedima . . . victims with direct injury would be compensable as well as victims with indirect injury whose compensability was unquestioned and assumed. Sedima, (fn. 15)".

P. 49: ". . . directly (and) indirectly injured . . . have standing (fn. 15)".

Similarly, respondent refuses to

look to Sedima pages 521-522 as Sedima fn. 15 directs to see who has RICO standing. The examples on p. 521-522, all nine justices agree, have RICO standing. This was pointed out in the petition at:

> P. 45: "This Court in Footnote 15 . . . said of damages recoverable under RICO: 'Such damages include, but are not limited to, the sort of competitive injury for which the dissenters would allow recovery. See post at 521-522.'"
>
> P. 46: ". . . p. 521-522 . . . illustrate the . . . injuries . . . all nine justices agreed were recoverable under . . . footnote 15."
>
> P. 55: ". . . (E)xamples in Sedima, p. 521-522 that all nine justices felt had RICO standing, see footnote 15, shows standing to be allowed by Sedima to those much further from the activities of the racketeers." (emphasis added)

The respondents are unable to respond to Footnote 15of Sedima which continue to accord relief to victims with

"racketeering 'injury", "competitive injury" and "indirect injury" after Sedima, and to pages 521-522 of Sedima which give examples of victims with RICO standing whose injuries are much more remote from the RICO violations than were the petitioners'.

V. SERIOUS CONFLICT EXISTS AMONG NINE CIRCUITS

As quoted above, Sedima, fn. 15, Sperber, p. 63, and Bankers Trust, p. 6605, all acknowledge that there continues to be standing for those with "Racketeering Injury", i.e., injury "caused by the total effect of the pattern of racketeering". Sperber, p. 63, and those with injury "suffered from the RICO violations as a whole . . ."

Respondents at p. 13 make the astounding statement that there is no conflict among the circuits, astounding

because the Courts of Appeal feel there is conflict, see Petition p. 14-34, and, e.g., National Enterprises v. Mellon Financial Services, 847 F.2d 251, 253 (5th Cir. 1988).

> "whether an indirect injury is sufficient to constitute standing in a RICO action is a contested question among the federal courts". (emphasis supplied)

In an attempt to prove their contention the respondents, at p. 15, cite cases that they say "acknowledge that the proper inquiry . . . is whether the alleged injury flows from the commission of the predicate acts . . ." but they then cite Sperber, p. 64, Flip Side, p. 1035, and Grantham & Mann, p. 606, which say no such thing.

Thus again petitioner respectfully refers the Court to Part I in which it is suggested that the Respondents' Brief be Stricken.

As to whether conflict exists among the Circuits, petitioner submits that the Court should look to the acknowledgment by courts that such conflict among the circuits exists, see, e.g., National Enterprises, supra, at 253, and to the cases, Petition, p. 14-34, or themselves. The Court should not rely on the brief of the Respondents.

VI. NO COLLATERAL ESTOPPEL

Respondents assert that the trial of a contract issue between Diamond and a non-party, Robertshaw, somehow estops Diamond from suing others, i.e., the RICO defendants for his injuries caused by their RICO violations. For collateral estoppel an issue must be both necessary and essential to the final judgment in the action. NLRB v. Masters Lock, 773 F.2d 77 (6th Cir. 1985); 1B Moore's Federal Practice ¶0.443 [5.-1] (2nd ed.

1987). The court in the contract case said that the only issue necessary and essential for judgment (see p. A23-24, Respondents' Brief), the pivotal question, was whether RMC actually gained control over ROB. The court specifically found that the existence or non-existence of a plan to acquire ROB stock was not necessary and essential to its judgment: "the Court need not determine whether such a plan in fact existed" (see n. 6 at A-11, Respondents Brief).

Respondents' assertion that RMC's lack of a plan to take over Robertshaw is proven by the fact that another company eventually acquired ROB is ludicrious. Respondents' brief, p. 3.

Because of the conflict among nine circuits on this important issue of standing for injury by racketeering activity, the failure of the Third Circuit to follow Sedima in this case, and the recurring nature of this fact pattern, it is respectfully requested that the petition for writ of certiorari be granted.

Respectfully submitted

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